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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

RALLY'S, INC.,

Petitioner,

vs.

INTERNATIONAL SHORTSTOP, INC., and SAM TALKINGTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether under this Court's decisions in *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940), and *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938), a federal court in a diversity action must follow state intermediate appellate court decisions on point in the absence of any state supreme court decision on point.

II. Whether before granting a summary judgment it is an abuse of a federal district court's discretion to not grant a non-moving party's Federal Rules of Civil Procedure Rule 56(f) request for a continuance when the non-moving party fails to timely submit an affidavit in support of its request.

LIST OF PARTIES

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Rally's, Inc. ("Rally's"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on August 29, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 939 F.2d 1257 (5th Cir. 1991), and is reprinted in the Appendix at App. 1-30.

The opinion of the United States District Court for the Western District of Texas, Austin Division, is not reported and is reprinted in the Appendix at App. 31-48.

The judgment and order of the United States District Court for the Western District of Texas, Austin Division, is not reported and is reprinted in the Appendix at App. 49-52.

The order of the United States Court of Appeals, Fifth Circuit, denying Rally's petition for rehearing is not reported and is reprinted in the Appendix at App. 53.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was rendered on August 29, 1991. On October 11, 1991, the Fifth Circuit denied Appellee Rally's Inc.'s petition for rehearing. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Tex. Const. art. I, § 13. "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

STATEMENT OF THE CASE

A. Overview

The first issue in this case is whether a federal court in a diversity action must follow state intermediate appellate court decisions in the absence of any state supreme court decision on point. There is a wide split in authority among the United States Courts of Appeal on this point, and there is a split of authority within the Fifth Circuit itself, the court from which this appeal arises. This case calls upon this Court to clarify its decisions in *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940), and *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938), regarding this issue. The Fifth Circuit erred in this case by not following two Texas intermediate appellate decisions on point, *Prappas v. Meyerland Community Improvement Ass'n*, 795 S.W.2d 794 (Tex. App. – Houston [14th Dist.] 1990, no writ), and *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. – Dallas 1985, writ ref'd n.r.e.).

The second issue in this case is whether before granting a summary judgment it is an abuse of a federal district court's discretion to decline to grant a non-moving party's Federal Rules of Civil Procedure Rule 56(f) request when such a request is not timely accompanied by an affidavit describing why a continuance is necessary. The Fifth Circuit erred by ruling that no affidavit is required. As noted by various Courts of Appeal, there is a split in authority among the Courts of Appeal on this point. *See, e.g., Hotel & Restaurant Emp. Union v. Attorney General*, 804 F.2d 1256, 1269 (D.C. Cir. 1986); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780 n.4 (3rd Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). The plain wording of Rule 56(f) requires an affidavit.

B. Factual Background & Procedural History

Rally's, Inc. ("Rally's") is a franchisor of fast food restaurants. International Shortstop Inc. ("Shortstop") is also a fast food franchisor. Because this is a summary judgment case, the facts alleged by Shortstop were taken as true. In August 1988, Sam Talkington ("Talkington"), President of Shortstop (collectively "Shortstop"), began preliminary discussions with Al Copeland ("Copeland"), for the sale of Shortstop to Copeland. By March, 1989, Talkington and Copeland had not executed any agreement for the sale of Shortstop to Copeland. During the Fall, 1988, Rally's began receiving complaints from its franchisees that some Shortstop franchises were copying Rally's buildings' appearance, thereby generating confusion among Rally's customers. In December, 1988, Rally's contacted its attorneys regarding this matter. The Shortstop and Rally's Presidents discussed settlement of this matter in March, 1989. These efforts failed, and on March 23, 1989, Rally's filed suit against Shortstop in federal district court in Arkansas alleging, among other things, trade dress infringement (the "Arkansas lawsuit").

Shortstop filed this suit in Texas state court alleging that Rally's Arkansas lawsuit was filed in bad faith and constituted tortious interference with Shortstop's proposed sale to Copeland. Shortstop alleged that Copeland declined to purchase Shortstop because of the Arkansas lawsuit. Rally's removed this action into federal district court on August 11, 1989. The federal district court asserted jurisdiction of this matter based upon diversity jurisdiction, 28 U.S.C. § 1332. The parties began discovery shortly thereafter in September, 1989.

Several months later, in May, 1990, the district court set the case on the trial calendar commencing September 24, 1990, and ordered that discovery be completed by August 13, 1990. On June 28, 1990, Rally's moved for summary judgment. Rally's contended, among other things, that it was privileged as a matter of law to file the Arkansas lawsuit and that the Arkansas lawsuit therefore could not constitute the basis of a tortious interference cause of action. On July 23, 1990, Shortstop filed its opposition to Rally's motion. In a footnote in the opposition Shortstop claimed it was preparing to depose three individuals, and cited Federal Rules of Civil Procedure Rule 56(f). No Rule 56(f) affidavit was filed. On August 17, 1991, after discovery cut-off, Shortstop filed a motion that contained an affidavit by its most junior attorney describing in a paragraph why additional discovery was supposedly necessary. On August 23, 1991, the district court found there was no dispute as to any material issues of fact regarding Rally's privilege to file the Arkansas lawsuit, but denied the summary judgment. The district court concluded that there were genuine disputes as to facts regarding a separate cause of action by Shortstop against Rally's not related to the Arkansas lawsuit. Rally's filed a motion for reconsideration, and the district court granted a full summary judgment on September 17, 1990.

The United States Court of Appeals for the Fifth Circuit vacated and remanded the district court's decision. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991). The Fifth Circuit ruled that it was "not persuaded" by the Texas intermediate appellate court decisions which held that a lawsuit is absolutely privileged and therefore cannot be the basis of a tortious

interference action. *Id* at 1269, n.12. The Fifth Circuit also ruled that the district court abused its discretion by failing to grant Shortstop's Rule 56(f) motion for a continuance. *Id.* at 1268. The Fifth Circuit ruled it was not necessary for the non-moving party to file an affidavit with its Rule 56(f) motion stating the reasons why a continuance is necessary. *Id.* at 1266.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should be Granted Because There is a Wide Split Among the Circuits Regarding Whether a Federal Court in a Diversity Action is Required to Follow a Forum State's Intermediate Appellate Decisions on Point.

The first issue in this case is whether the Fifth Circuit, in a diversity action, must follow Texas (the forum state) intermediate appellate court decisions on point in the absence of any state supreme court decision on point. There is a substantial split among the United States Courts of Appeal regarding this fundamental question that arises very frequently in federal courts across the United States.

Some of the United States Courts of Appeal, including the Second, Fourth, and Seventh Circuits, have ruled that a federal court in a diversity action is *not* required to follow holdings of intermediate forum state appellate courts in the absence of a forum state's highest court decision on point. *See, e.g., Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1275 (2d Cir. 1990);

Klippel v. U-Haul Co. of Northeastern Michigan, 759 F.2d 1176, 1181 (4th Cir. 1985); *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990); *but see, Burrus v. Young*, 808 F.2d 578, 581-86 (7th Cir. 1986).

Some of the Circuit Courts, including the Seventh, Tenth and Eleventh Circuits, have ruled that a federal court in a diversity action *must* follow forum state intermediate appellate court decisions. *See, e.g., Burrus v. Young*, 808 F.2d 578, 581 (7th Cir. 1986); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986); *Blanchard v. State Farm Mut. Auto Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990).

Some of the Circuit Courts, including the Third, Sixth, and Ninth Circuits, have ruled that forum state's intermediate appellate court decisions must be followed by a federal court sitting in diversity absent convincing evidence that the state's highest court would decide the issue differently. *See, e.g., McGowan v. University of Scranton*, 759 F.2d 287, 291 (3rd Cir. 1985); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140-41 (6th Cir. 1986); *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir. 1985), *cert. denied*, 474 U.S. 845 (1985).

The Fifth Circuit, the court from which this appeal arises, is itself apparently split on this question. *See Lavespere v. Niagra Mach. & Tool Works, Inc.*, 920 F.2d 259, 260 n.9 (5th Cir. 1990) (state intermediate appellate court decisions should be followed absent a strong showing that the state supreme court would rule differently); *Green v. Walker*, 910 F.2d 291, 294 (5th Cir. 1990) (the United States Supreme Court's directive in *Erie* to apply

the forum state's law does not eliminate the federal decision-making process). In the instant case the Fifth Circuit did not follow two Texas intermediate appellate court decisions on point. There is no Texas supreme court decision on point.

This Court in *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938), ruled that a federal court exercising diversity jurisdiction is obliged to apply the substantive law of the state in which it sits. When the state's highest court has ruled on a matter the state's law is clear. In the absence of an opinion on point by the highest court in the state the question arises whether the federal court must follow the state's law as determined by the state's intermediate appellate court decisions.

This Court ruled in *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940), that in a diversity action a federal court should follow state law as articulated by state intermediate appellate court decisions when the state's highest court has issued no decision on point. In *West* this Court reversed the Sixth Circuit when it failed to follow a state intermediate appellate court decision in Ohio. This Court ruled that

> [a] state is not without law save as its higher court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law

> is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all of the available data what the state law is and apply it rather than prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. [Citations omitted]

Id. at 236-37. This Court further ruled that state intermediate appellate court decisions must be considered the rule of law in the state, absent a showing that *convinces* the court by persuasive data that the highest court of the state would rule otherwise. *Id.* at 237. This Court also ruled that a federal court is particularly bound to follow a state intermediate appellate court decision when the highest state court has refused to review the appellate court decision. *Id.* In the present case, the Texas supreme court refused to review *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. – Dallas 1985, writ ref'd n.r.e.), a Texas intermediate appellate decision on point. The principal issue in *Griffin* for the Texas supreme court to review was whether an absolute privilege applied to a lawsuit in a tortious interference action, precisely the question before the Fifth Circuit in the instant case.

This Court further noted that even though the state supreme court may at some later time modify the rule of the appellate court, "whether that will ever happen remains a matter of conjecture" until the state supreme court actually considers the question. *West*, 311 U.S. at 238. In the meantime, the state rule as described by the state appellate court prevails. *Id.*

The state rule in Texas, as determined by *two* Texas intermediate appellate court decisions, is that a lawsuit cannot, as a matter of law, constitute the basis of a claim for tortious interference with contract. *Prappas v. Meyerland Community Improvement Ass'n*, 795 S.W.2d 794 (Tex. App. – Houston [14th Dist.] 1990, no writ); *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. – Dallas 1985, writ ref'd n.r.e.). Under the *Erie* doctrine, as described by this Court in *West*, a federal court is not free to substitute another rule. *West*, 311 U.S. at 236-38; *See also, Fidelity Union Trust Co. v. Field*, 311 U.S. at 169, 177-78 (1940).

In this case there is no state supreme court decision on point. There are two Texas supreme court decisions discussed by the Fifth Circuit in its opinion, *Sakowitz Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984), and *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931 (Tex. 1991). Neither of these two cases is on point because neither involved the filing of a lawsuit as the basis of the tortious interference claim. The Fifth Circuit did not dispute this point but noted with approval that the district court considered it to be a "distinction without a difference." *Shortstop*, 939 F.2d at 1269. This is not correct. It is legally significant that neither *Sakowitz* nor *Victoria* involved a lawsuit as the basis of the tortious interference claim.

Texas public policy seeks to assure litigants access to the courts. This public policy is incorporated into the State Constitution, art. I, § 13, commonly known as the Texas Open Courts Provision, which states that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." As the Texas supreme

court noted in *Lucas v. United States*, 757 S.W.2d 687, 696 (Tex. 1988),

> Article I, Section 13 provides two separate and distinct guarantees: (1) that all courts shall be open, and (2) every person shall have a remedy for injury by due course of law. The former category guarantees a right of "access," while the latter category guarantees a right of "redress."

The Texas supreme court noted in *Lucas* that there is no provision in the federal constitution corresponding to the Texas constitution's "open court guarantee." *Id.* at 690. The court ruled in *Lucas* that the statutory limitation on medical malpractice damages violated this open courts guarantee. "Texas Constitution Article 1, Section 13, guarantees meaningful access to the courts whether or not liability rates are high." *Id.* at 691. A lawsuit is the means of obtaining entrance through the "open door" of Texas courts. As such, it is accorded special state constitutional protection.

Texas state intermediate appellate court decisions involving the filing of a lawsuit as the basis of the claim for tortious interference recognize this constitutional protection. Texas decisions recognize that all communications made in "judicial proceedings" are absolutely privileged. *Sharif-Munir-Davidson Dev. v. Bell*, 788 S.W.2d 427, 430 (Tex. App. – Dallas 1990, writ denied) ("Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged."); *Griffin*, 702 S.W.2d at 694. If Rally's, for example, had filed suit under the civil RICO statute and described the defendant as a "racketeer" in its pleading, the defendant could not sue Rally's for defamation as a

matter of law. This is because a party to a lawsuit is absolutely privileged to make statements in its pleadings without the fear of a lawsuit being filed for defamation. If Rally's, however, had claimed that the defendant was a "racketeer" in some document *not* filed with the court, but sent to some third party, the defendant would *not* be barred from filing suit against Rally's. There is obviously no absolute privilege against defamation for documents not filed in a judicial proceeding. Under the example, the Fifth Circuit's opinion means that as a matter of law the defendant could not sue Rally's for defamation but could sue Rally's for tortious interference with prospective business relations if a third party read Rally's pleading and decided not to purchase the defendant's company because the third party did not wish to make a deal with an alleged "racketeer." Rally's submits that such a rule violates common sense and is a clear circumvention of the absolute privilege provided to litigants' pleadings filed in court.

In *Griffin* the Texas Court of Appeals in Dallas expressly considered the reach of the absolute privilege and explicitly ruled that the absolute privilege extended to tortious interference actions, as well as to libel or slander claims. *Griffin*, 702 S.W.2d at 695. *Griffin* is directly on point but was not followed by the Fifth Circuit in the instant case.

The most recent Texas intermediate appellate court decision on point is *Prappas v. Meyerland Community Improvement Ass'n.*, 795 S.W.2d 794 (Tex. App. – Houston [14th Dist.] 1990, no writ), which held that the filing of a lis pendens claim, since it is part of "judicial proceedings," is absolutely privileged and cannot be the source of

a claim for tortious interference. In *Prappas* the starting point of the court's analysis was the Texas Constitution. After first noting that under Texas law an absolute privilege extended to all judicial proceedings, and the Texas supreme court's decree that litigants should be assured access to the judicial system, the question for the *Prappas* court was whether a lis pendens is part of the judicial process so that the resulting absolute privilege bars a damage suit for tortious interference over the filing of the lis pendens. The *Prappas* court ruled that a lis pendens is part of "judicial proceedings" since it is essentially a part of the *lawsuit* itself:

> Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice we hold that the filing of a notice of lis pendens in this action is part of the "judicial proceeding."

Prappas, 795 S.W.2d at 797. *Prappas* is on point but was not followed by the Fifth Circuit in the instant case.

The state intermediate appellate court decisions noted by the Fifth Circuit in its opinion were not on point. *International Shortstop*, 939 F.2d at 1269 n.12. In *Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 1020 (1985), the defendant did not even assert the affirmative defense of legal privilege. Moreover, as the district court in this case correctly noted, the quote in *Garza v. Mitchell*, 607 S.W.2d 593, 600 (Tex. Civ. App. – Tyler 1980, no writ), relied upon by the Fifth Circuit in its opinion, is pure dicta.

II.

Certiorari Should be Granted Because There is a Wide Split Among the Circuits Regarding Whether a Rule 56(f) Request for a Continuance Must be Supported by an Affidavit.

The second question in this case is whether the Fifth Circuit erred when it ruled that the district court abused its discretion by failing to grant Shortstop's Rule 56(f) request for a continuance when Shortstop failed to timely submit an affidavit stating the reasons why a continuance was necessary. It is well settled law in the Fifth Circuit, and in other circuits, that the grant or denial of a continuance, pursuant to Rule 56(f), to extend discovery past the district court's discovery cut-off date, rests within the sound discretion of a district court, to be disturbed on appeal only if the decision reflects an abuse of that discretion. *See, e.g., Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 102 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 60 (1991); *Paul Kadair Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029 (1983). It has been stated that a district court's discretion is "exceedingly wide" for decisions regarding whether to grant such a continuance:

> When the question for the trial court is a scheduling decision such as whether a continuance should be granted, the judgment range is exceedingly wide, for, in handling its calendar and determining when matter should be considered, the district court must consider not only the facts of a particular case, but also all of the demands on counsel's time and the court's.

Fontenot v. Upjohn, 780 F.2d 1190, 1193 (5th Cir. 1986).

The rationale for this "exceedingly wide" discretion in scheduling matters is obvious in today's litigation world: The district courts in many, if not most areas of the country have excessive case dockets, both civil and criminal. The courts of appeal have experienced a concomitant increase in their case loads. To meet the demands of its case load a district court must be permitted to set reasonable time deadlines regarding procedural matters such as when trials will begin, and when pre-trial matters, including discovery, will reasonably be concluded, just as this Court must set reasonable deadlines for filing applications for certiorari, filing supporting briefs, and other matters. The district court is in the best position to determine its own schedule which should not be "second guessed" by an appellate court absent of a clear abuse of discretion. Moreover, attorneys practicing before the courts must be able to depend upon the district courts' scheduling order to schedule their own trials and other work.

In this case Shortstop filed its suit in July, 1989. Both Shortstop and Rally's began discovery soon after via deposition subpoenas duces tecum. Several months later, in May, 1990, the district court ordered that any additional discovery be completed by August 13, 1990, in time for trial scheduled for the week beginning September 24, 1990. Discovery cut-off was therefore established over one year after Shortstop filed suit in this case.

The Fifth Circuit ruled in its opinion that "to obtain a continuance for additional discovery, the non-moving party must request it from the district court. *See Childers*

v. Joseph, 842 F.2d 689, 693 n.3. (3rd Cir. 1988) (court not obligated to allow for additional discovery absent request from non-moving party)." *International Shortstop*, 939 F.2d at 1266. The Fifth Circuit ruled that the "proper but not only" way of requesting additional time for discovery is for the non-moving party to present an affidavit containing specific facts explaining its failure to respond to the moving party's motion for summary judgement via counter affidavits establishing genuine issues of material fact for trial. *Id.* The Fifth Circuit ruled that although this is the "proper" and "preferred" method of requesting additional time, it is not the only method. The Fifth Circuit, quoting from *Fontenot v. UpJohn*, 780 F.2d 1190 (5th Cir. 1986), ruled that it would accept "some equivalent statement, preferably in writing" of the need for additional discovery. *Id.* at 1267. Thus, the Fifth Circuit ruled that the non-moving party need *not* submit a sworn affidavit stating why additional discovery was necessary, and need not even present its Rule 56(f) request in writing. *Id.* The plain wording of the Rule, however, *requires* an affidavit to be filed. Rule 56(f) reads:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Fifth Circuit's analysis in this matter is flawed. The Fifth Circuit's quote from *Fontenot* is truncated and

does not provide the full flavor of the *Fontenot* court's point. The *Fontenot* court ruled

> While a party's failure to comply with Rule 56(f) procedure does not preclude consideration of the motion, some equivalent statement, preferably in writing or at least at the hearing of the motion, is expected. Ms. Fontenot's counsel neither filed such an affidavit nor stated any facts that would have required a continuance.

The facts in this case are very close to those in *Fontenot*. Here, Shortstop neither filed an affidavit prior to discovery cut-off nor stated any facts that would require a continuance. Shortstop merely stated in its opposition to Rally's motion for summary judgment that it had "noticed" three individual's depositions. This is insufficient even under the *Fontenot* decision. Moreover, the Fifth Circuit's reliance upon *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973), is misplaced. *Littlejohn* was obviously decided long before the trilogy of cases on summary judgment issued by this Court in 1986, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Littlejohn* the plaintiff's counsel filed a written statement with the court setting forth the precise reasons why a continuance was necessary in the case. *Littlejohn*, 483 F.2d at 1146. In the instant case Shortstop did not state in its opposition to Rally's motion for summary judgment the reasons why it supposedly required a Rule 56(f) continuance.

The Fifth Circuit further cites *Radich v. Goode*, 886 F.2d 1391, 1399 (3d. Cir. 1989), as supposedly being in

accord with its position. The Fifth Circuit is simply wrong. *Radich* supports *Rally's* position in this matter. The facts in *Radich* are very similar to those in the instant case. In *Radich* the non-moving party did not file a Rule 56(f) affidavit. The non-moving party argued, however, that their attorneys' unverified memorandum opposing the motion for summary judgment complied with the Rule 56(f) affidavit requirement. *Id.* This is precisely the Fifth Circuit's ruling. But the *Radich* court ruled that the unverified memorandum did *not* comply with Rule 56(f). *Id.* at 1394.

The *Radich* court noted that the purpose of the affidavit is to ensure that the non-moving party is invoking the protection of Rule 56(f) in good faith and to afford the trial court the necessary showing to assure the merit of the party's opposition. *Id.* As one court has noted, "[t]he requirement that affidavits must be filed is no mere mechanical trap for unwary lawyers; rather, it serves the important purpose of preventing delay in cases where there is no basis for supposing that, if only the time for response is stretched out, an issue of fact may emerge." *McVan v. Bolco Athletic Co.*, 600 F. Supp. 375, 378 (E.D. Pa. 1984). As the *Radich* court concluded, "[a]n unsworn memorandum opposing a party's motion for summary judgment is not an affidavit." *Radich*, 886 F.2d at 1394.

In *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988), the court stated flatly that in the Eleventh Circuit a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f). There is therefore a split in authority among the Circuits on this point. At least two courts have

expressly recognized this split. *See, e.g., Hotel & Restaurant Emp. Union v. Attorney General*, 804 F.2d 1256, 1269 (D.C. Cir. 1986); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780 n.4 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Several courts, including the Second, Third, Ninth, and Tenth Circuits, have ruled that a party *must* file an affidavit to comply with Rule 56(f). *See, e.g., Burlington Coat Factory Warehouse v. Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985); *Lunderstadt v. Colafella*, 885 F.2d 66, 70 (3d Cir. 1989); *Radich v. Goode*, 886 F.2d 1391, 1399 (3d Cir. 1989); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780 n.4 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *British Airways Board v. Boeing Company*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Gray v. Udevitz*, 656 F.2d 588, 592 (10th Cir. 1981).

The Third Circuit notes that "[m]ost courts which have considered the issue agree that filing an affidavit is necessary for the preservation of a Rule 56(f) contention that summary judgment should be delayed pending further discovery." *Mid-South Grizzlies*, 720 F.2d at 780 n.4. Rally's submits that this is the better reasoned approach. The Fifth, Eleventh and D.C. Circuits, however, have ruled that no affidavit need be filed with a party's Rule 56(f) request. *See, e.g., Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973); *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988); *Hotel & Restaurant Emp. Union v. Attorney General*, 804 F.2d 1256, 1269 (D.C. Cir. 1986). Thus, there is a clear split among the Circuits on this significant point. This Court has repeatedly emphasized that summary judgment is an important tool to

quickly end spurious or frivolous litigation. This important tool's usefulness will be considerably curtailed if a non-moving party is able to defeat the summary judgment by merely making an unverified, unsworn statement that additional discovery is necessary in the case. The district court and the moving party need to be assured that the non-moving party is making its claim in good faith and is not simply interested in engaging in a fishing expedition. Therefore, an affidavit should be required, as the plain wording of Rule 56(f) mandates.

CONCLUSION

Each day federal district and appellate courts in diversity actions are confronted with the question of how to determine the forum state's law when there is no opinion on point by the forum state's highest court. There is a wide split in authority among the United States Courts of Appeal on this question. This Court could eliminate this confusion by granting this petition so that a forum state's law is applied in an evenhanded fashion to all litigants appearing in the federal courts of that state. The principles underlying this Court's decision in *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938), will be eroded if federal courts do not believe they must follow state intermediate appellate court decisions on point. The principle of federalism also compels federal courts to follow a forum state's laws and constitution as interpreted by the state's intermediate appellate courts, in the absence of an opinion by the state's highest court.

Regarding Rally's second issue, this Court has repeatedly emphasized during the past several years the importance of summary judgments to cut short frivolous litigation. This valuable tool will be enervated if courts permit non-moving parties to defeat summary judgment motions by merely claiming, without filing an affidavit, that additional discovery is necessary. Rally's respectfully requests that this Court grant its petition for certiorari, reverse the Fifth Circuit's judgment below, and affirm the district court's order granting summary judgment.

Respectfully submitted,

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November, 1991

INTERNATIONAL SHORTSTOP, INC., and Sam Talkington, Plaintiffs-Appellants,

v.

RALLY'S, INC., Defendant-Appellee.

No. 90-8563.

United States Court of Appeals, Fifth Circuit.

Aug. 29, 1991.

Shannon H. Ratliff, Stuart N. Whitlow, Marc O. Kinisely, McGinnis, Lochridge & Kilgore, Austin, Tex., for plaintiffs-appellants.

Douglas L. Hilleboe, Scott R. Kidd, Brown, Maroney & Oaks Hartline, Austin, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, SMITH, and BARKSDALE, Circuit Judges.

GOLDBERG, Circuit Judge:

In this trade-dress case, we must determine whether it was too precocious of the district court to strip the plaintiffs of a jury trial on their tortious interference claim before the facts were more fully clothed.

I. BACKGROUND MATERIAL

This case is on appeal following the entry of summary judgment by the district court. Concluding that there were no genuine disputes of material fact with respect to the defendants' affirmative defense, the district court held that the defendants were entitled to a judgment in their favor as a matter of law. On appeal, the plaintiffs contend that the district court should not have entered summary judgment until the outstanding discovery was complete. Plaintiffs also contest the district court's interpretation of the relevant substantive law and its conclusion that on the record before the court there were no disputed issues of fact precluding summary judgment.

Because this matter is before the court following summary judgment, we are obliged to construe all the evidence and reasonable inferences deduced therefrom in a light most favorable to the plaintiffs, the nonmoving party in the court below.

A. The Fact Pattern

Plaintiffs are International Shortstop, Inc. and its president Sam Talkington (collectively referred to as "Shortstop"); the defendant is Rally's, Inc. ("Rally's"). They are direct competitors in the business of fast-food, take-out restaurants, specializing in the rapid service of hamburgers and other products of the culinary art sold at drive-through windows.

Shortstop was formed by Sam Talkington in 1984. Sometime in August 1988, Talkington began preliminary

negotiations with Al Copeland for the sale of Shortstop to Copeland. Copeland was the majority shareholder of A. Copeland Enterprises, Inc., owner of the Popeye's fast-food chicken chain. Talkington hoped that the merger would offer Shortstop a network of franchise locations, franchisees, and other resources which would propel Shortstop's growth. At a meeting in late August, Copeland and Talkington agreed that Copeland would purchase Shortstop for $1.2 million. Both men believed that they reached a firm agreement concerning the Copeland-Shortstop purchase. They relegated to their financial officers the task of arranging for the structure of the deal. In late December the two men confirmed in a conversation that the Copeland-Shortstop deal would close sometime shortly after the completion of Copeland's takeover of the Church's Fried Chicken chain, which had begun in the fall of 1988.

Rally's was formed in 1985 and opened its first restaurant in Jeffersonville, Indiana, eighteen months after Shortstop opened its restaurant in Austin, Texas. By the fall of 1988, Rally's had several restaurant locations, including Miami, Florida, Shreveport, Louisiana, and Little Rock, Arkansas. Rally's began receiving complaints from these franchisees that Shortstop franchises were copying Rally's' building appearance, generating confusion among Rally's customers. Specifically, in January 1989, the Arkansas franchisee contacted Richard Sherman, President of Rally's (formerly president of Church's), to complain that a Shortstop franchise under construction looked very similar to the Rally's franchise.

In December 1988, Sherman had contacted a lawyer in connection with the alleged trade-dress infringement.

This was not the first time that Rally's entertained the notion of protecting its perceived trade-dress: over the course of the previous three years, Rally's had pursued infringement claims against eight other companies, excluding Shortstop, and indeed, Rally's had appreciable success. It won two of the lawsuits it filed, settled three cases, and had pending suits against the remaining companies.

Meanwhile, throughout 1988, Sherman had expressed interest in expanding Rally's by purchasing surplus property from Church's. Aware of the pending takeover of Church's by Copeland, Sherman contacted Copeland in February 1989 to discuss the purchase of Church's locations upon consummation of the takeover. They met on March 1, 1989, to discuss the purchase. Sherman was already aware that Copeland had a general interest in also acquiring Shortstop but was apparently not aware of the precise negotiations which had transpired between Talkington and Copeland. During the March 1st meeting, however, Copeland told Sherman of the Copeland-Shortstop agreement. In response, Sherman commented that Shortstop was a "third tier" company that did not have a very strong franchise system, and that Copeland would be far better off associating with Rally's than with Shortstop. No mention was made at that meeting that Rally's was contemplating a trade-dress infringement lawsuit against Shortstop.

The following week, Sherman inquired of Jim Flynn, president of Copeland Enterprises, regarding the availability of the surplus Church's locations. He also asked about the status of the Copeland-Shortstop deal.

Between March 7 and March 17, 1989, Sherman conferred with his counsel about instituting a trade-dress infringement action in Arkansas. According to Rally's, they had contemplated bringing such an action since December 1988, but there had been some delay in pursuing the action because counsel for Rally's was tied up with other, unrelated matters. In any event, Rally's' counsel soon contacted Talkington (Shortstop's president) to advise him of Rally's' intentions to file a trade-dress infringement action in Arkansas.[1] This was the first Talkington had heard of Rally's' concerns about alleged trade-dress infringement by Shortstop.

On March 22, 1989, Sherman and Talkington discussed the lawsuit. Sherman indicated that Rally's had filed the lawsuit on March 20, but that it had nothing to do with the Copeland-Shortstop deal. Settlement efforts failed. On the same day, Sherman called Flynn of Copeland Enterprises to congratulate him on the successful takeover of Church's. He also mentioned to Flynn that Rally's had instituted the Arkansas lawsuit against Shortstop, but indicated that the litigation had nothing to do with the Copeland-Shortstop deal. In fact, the lawsuit

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[1] Rally's' counsel would not represent Rally's because of conflicts of interest arising from counsel's previous representation of Shortstop. Accordingly, they contacted an Arkansas law firm to handle the matter, sent it copies of pleadings from other trade-dress lawsuits initiated by Rally's, and took no further action. Two days later, the Arkansas law firm filed a lawsuit on behalf of Rally's against Shortstop, alleging trade-dress infringement in connection with the Little Rock, Arkansas restaurant.

was not filed until the following day (the "Arkansas lawsuit").

Because of Rally's' Arkansas lawsuit against Shortstop, Copeland declined to consummate the purchase of Shortstop. In the words of Copeland himself, the lawsuit "interfered with the deal." In Copeland's view, the lawsuit threatened to undermine Copeland's intended expansion of Shortstop because if Rally's succeeded, Copeland would have been forced to change the image of all of the Shortstop restaurants. He also observed that "[f]ranchisees don't want to buy into companies that have major lawsuits."

B. The Procedural Weave

Shortstop filed the instant lawsuit in Texas state court alleging, *inter alia*, that Rally's' Arkansas lawsuit was filed in bad faith and constituted tortious interference with the Copeland-Shortstop agreement.[2]

Rally's removed the action to federal district court on August 11, 1989. Rally's promptly moved the court to dismiss the complaint. Shortstop amended the complaint, and Rally's again moved to dismiss. Once the motion was fully briefed, the court took the motion under advisement and by order dated May 7, 1990, denied the motion.

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[2] Shortstop also alleged that Sherman's statements to Copeland disparaging Shortstop ("third tier" company, etc.) were separately actionable under a theory of tortious interference. The district court entered summary judgment against Shortstop on that claim but Shortstop has abandoned that claim in this appeal.

Simultaneously, the district court set the case on the trial calendar commencing September 24, 1990, with a discovery cut-off deadline of August 13, 1990. The court admonished the parties that "Motions to Compel, Motions for Protective Order, and similar motions" were "discouraged."

The parties proceeded with discovery, which had already been underway since early in the case. On June 28, 1990, before the discovery cut-off, Rally's moved for summary judgment averring the absence of a genuine dispute of material facts. Specifically, Rally's contended that it was privileged as a matter of law to file the Arkansas lawsuit and that therefore, the Arkansas lawsuit could not form the basis of a tortious interference cause of action. In Rally's' view, the filing of a lawsuit, whether in bad faith or otherwise, was *absolutely* privileged. Rally's also maintained that Shortstop's cause of action necessarily would fail because the evidence in the record did not establish the requisite elements of tortious interference, namely, the existence of a *contract* between Copeland and Shortstop, willful and intentional interference by Rally's, proximate causation, and damages. Shortstop filed a timely response to the merits of Rally's' motion for summary judgment, but indicated in a footnote to its memoradnum that several depositions were still pending.

Meanwhile, the parties were unable to resolve a discovery dispute: Shortstop sought from Rally's and its trade-dress lawyers disclosure of information concerning the Arkansas lawsuit in order to establish Rally's' bad faith in proceeding with that lawsuit. Rally's had refused to provide that information, invoking the attorney-client

privilege and the attorney work-product doctrine. Left with no choice but to seek court intervention, Rally's moved the court on July 23, 1990 to quash and for a protective order; in turn, Shortstop moved to compel the discovery. All of the discovery motions were referred by the district court judge to a United States magistrate judge for resolution. The magistrate judge granted Shortstop's motion to compel on August 10, three days before the discovery cut-off, and ordered the discovery to proceed.

By August 13, the discovery cut-off date, Shortstop had not completed the necessary discovery, so Shortstop filed an amended motion to extend discovery.[3] Four days later, Shortstop moved the district court again to extend the discovery deadline and also requested permission to file a supplemental brief in opposition to Rally's' motion for summary judgment. Shortstop alerted the district court to the proceedings before the magistrate judge, indicating that it expected to obtain, through the additional discovery, attorney-client evidence undermining Rally's' claimed privilege to file the Arkansas lawsuit. On the same day, Rally's filed an appeal to the district court from the magistrate judge's discovery order and asked the court to stay discovery pending the appeal.[4]

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[3] On August 9, Shortstop had moved the court to extend discovery indicating that Rally's consented to the extension in part only.

[4] The discovery matter concerning the disclosure of the attorney-client materials is not before us for consideration in this appeal.

The court never ruled on these discovery matters. Instead, on August 23, the court filed its memorandum opinion and order on Rally's' motion for summary judgment. Without making reference to the pending discovery matters, the district court found that there was no dispute as to any material issues of fact regarding Rally's' privilege to file the Arkansas lawsuit (which allegedly interfered with the Copeland-Shortstop deal). The district court studied with great care the relevant body of Texas law and held that the privilege that Rally's was asserting was *qualified*, not *absolute* as Rally's contended. The court interpreted the privilege as being qualified by a "good faith" limitation: a lawsuit is privileged only if it asserts a "colorable claim" or if the party filing the lawsuit has a good faith belief that it asserts a colorable claim. The court concluded that the record amply supported Rally's' assertion of the qualified privilege; in the court's view, there was no evidence in the record contradicting Rally's' evidence that it filed the Arkansas lawsuit believing in good faith that it was asserting a colorable claim.[5] Although the privilege was a complete defense to the tortious interference claim, the district court nevertheless denied the motion for summary judgment. The court concluded that there were genuine disputes as to the facts germane to the elements of Shortstop's tortious interference claim precluding summary judgment. On Rally's' motion for reconsideration, however, the court entered

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[5] The court did find a dispute of fact as to whether Rally's was motivated by tortious intent. The court considered that factual dispute immaterial in light of its interpretation of Texas law.

summary judgment, apparently recognizing that its holding that Rally's held a qualified privilege as a matter of law vitiated Shortstop's interference claim in its entirey.

Shortstop appeals, permanently pressing its argument that the district court misinterpreted Texas law on the issue of privilege to tortiously interfere with a contract. Shortstop maintains that the privilege is qualified by the limitation that the allegedly tortious lawsuit be filed in good faith, which according to Shortstop means without malicious motive. In Shortstop's view, even if the party filing the lawsuit has a good faith belief that the claim asserted is colorable, the party may not file the lawsuit for the sole purpose of interfering with another's contract. In addition, Shortstop avers that even if the district court correctly interpreted the privilege under Texas law, there existed on the record before the court disputed issues of material fact as to Rally's' alleged "good faith" in filing the Arkansas lawsuit. Finally, Shortstop argues that the court erred by failing to permit the additional discovery which the magistrate judge had ordered; according to Shortstop, the discovery could have elicited evidence undermining Rally's' privilege.

II. LEGAL FABRIC

As this case is before us on appeal from the entry of summary judgment, we review the record *de novo*. *Fireman's Fund Insurance Co. v. Murchison*, 937 F.2d 204, 207 (5th Cir.1991). We are guided by the procedural framework of Rule 56 of the Federal Rules of Civil Procedure and two recent Supreme Court cases ironing out its wrinkles. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct.

2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. Judgment in Summary Fashion

Summary judgment is appropriate when the moving party, in a properly supported motion, demonstrates that there is "no genuine issue of material fact," *Anderson*, 106 S.Ct. at 2510, and that it is entitled to judgment in its favor as a matter of law. Fed.R.Civ.P. 56(c). Confronted with such a motion, the nonmoving party must direct the court's attention to evidence in the record which demonstrates that it can satisfy a "fair-minded jury" that it is entitled to verdict in its favor. *Anderson*, 106 S.Ct. at 2512. This can be accomplished by tendering affidavits, depositions, and other materials which provide evidentiary support for its claim. The nonmoving party cannot rest on the allegations in its complaint. Fed.R.Civ.P. 56(e). If the nonmoving party responds satisfactorily, the motion for summary judgment is denied, and the case proceeds to trial.

In resolving the motion, the court may not undertake to evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes; so long as the evidence in the record is such that a reasonble jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor, the court must deny the motion. *Anderson*, 106 S.Ct. at 2513; *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir.1987). Indeed, even if the moving party comes forward with an abundance of evidence supporting its theory of the case, the nonmoving party may nevertheless

defeat the motion by countering with evidence of its own, which, if credited by the fact-finder, would entitle the nonmoving party to a verdict in its favor. Or, the nonmoving party can defeat the motion by demonstrating that the evidence tendered by the moving party is itself laced with contradictions of fact. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 310, 102 L.Ed.2d 329 (1988). Of course, the court need only concern itself with contradictions of salient facts; factual disputes over issues not germane to the claim are simply irrelevant becuase they are not outcome determinative. The court may grant a motion, immaterial factual disputes notwithstanding. *Anderson*, 106 S.Ct. at 2510.

The application of this procedural mechanishm in civil litigation has been remarkably uniform. In the "run-of-the-mill" civil case, the defendant moves for summary judgment on the ground that the evidence in the record demonstrates that he is entitled to a judgment as a matter of law – that should the case proceed to trial, the plaintiff will not sustain its burden of proof and the court will necessarly direct a verdict in his favor.[6] The defendant's summary judgment motion is typically dressed in one of two styles: the defendant may affirmatively offer evidence which undermines one or more of the essential elements of the plaintiff's case; or, the defendant may

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[6] The Supreme Court has observed that the summary judgment "standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 106 S.Ct. at 2505.

simply demonstrate that the evidence in the record falls short of establishing an essential element of the plaintiff's case. *Celotex*, 106 S.Ct. at 2548; *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990). Under this latter option, the defendant need not produce evidence of its own because it is the plaintiff which will bear the burden of proof at trial. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986).

In response to a properly supported motion, the plaintiff comes forward with evidence of its own establishing each of the challenged elements of its case. Because factual disputes may not be resolved on motion for summary judgment, the plaintiff need not offer all of the evidence tending to support its case, only enough evidence "from which a jury might return a verdict in [its] favor. If [it] does so, there is a genuine issue of fact that requires a trial." *Anderson*, 106 S.Ct. at 2514.

The court then considers the record to determine whether there are any material disputes of fact. If there are any, the court denies the motion. The court's task is relatively straightforward because the nonmoving party, the plaintiff, is entitled to have the evidence considered in the light most favorable to it. Any reservations the court has concerning the evidence will preclude summary judgment. The court should enter summary judgment only if it appears from its review of the record evidence relied upon by the parties that the defendant is entitled to summary judgment as a matter of law. Naturally, if the record is devoid of evidence necessary to sustain plaintiff's burden of proof, the defendant, which bears no burden at all, is entitled to a judgment in its favor.

That is the run-of-the-mill case. This case, however, is a suit of a different fabric.[7] Rally's sought summary judgment on the ground that it was privileged as a matter of law to interfere with the Copeland-Shortstop deal. Rally's, the moving party, bore the burden of proof because privilege is an affirmative defense. *See Sterner v. Marathon Oil*, 767 S.W.2d 686 (Tex.1989). Where, as here, the *moving party* bears the burden of proof at trial, it must come forward with evidence which would "entitle it to a directed verdict if the evidence went uncontroverted at trial." *Golden Rule Ins. Co. v. Lease*, 755 F.Supp. 948, 951 (D.Colo.1991); *cf. Anderson*, 106 S.Ct. at 2512 ("The judge's inquiry, therefore, unavoidably asks . . . 'whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' "); *Chanel, Inc. v. Italian, Activewear of Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir.1991) ("But – partcularly where, as here, the moving party is also the party with the burden of proof on the issue – it is important to remember the nonmoving party must produce its significant, probative evidence only after the movant has satisfied its burden of demonstrating there is no genuine

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[7] *Anderson* was not a run-of-the-mill case either because it involved issues of "legal malice." In *Anderson*, plaintiff brought a libel action against a magazine company. The magazine company moved for summary judgment on the ground that there was no evidence of "actual malice" as required under First Amendment jurisprudence. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). The Court held that the plaintiff could not oppose the motion by merely asserting that "the jury might, and legally could, disbelieve the defendant's denial . . . of legal malice." *Anderson*, 106 S.Ct. at 2514.

dispute of any material fact."). As in any summary judgment context, the nonmoving party can defeat the motion by merely demonstrating the exitence of a genuine dispute of material fact. But because the moving party has the burden of proof under this scenario, the nonmoving party may also defeat the motion by showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party.

The district court in this case interpreted Texas law to provide for a qualified privilege. The court held that a party is privileged to file a lawsuit if it has a good faith belief that he is asserting a colorable claim. Relying principally on Rally's own assertion of good faith (presumably through the testimony of its president Sherman), the court found:

> no substantial showing to counter Defendant's assertion [that] Defendant filed the Arkansas lawsuit based on the good faith belief [that] Defendant stated a colorable claim. In short, Shortstop has failed to controvert Rally's assertion, and summary judgment evidence, tending to establish Rally's filed that suit in the good faith belief that it has a colorable claim. The Court therefore regards Defendant Rally's defense of privilege conclusively proved.

Memorandum opinion at 14 (R. 588). Thus, the court assessed the evidence tendered and made the determination that a jury would necessarily have accepted Rally's' claim of good faith. Rally's' state of mind was obviously the key to its claimed privilege.

When state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility. Credibility determinations, of course, are within the province of the fact-finder. Accordingly, we have emphasized repeatedly that cases which turn on the moving party's state of mind are not well-suited for summary judgment. *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111, 115 (5th Cir.1972); *Jones v. Borden Co.*, 430 F.2d 568, 574 (5th Cir.1970); *Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp.*, 401 F.2d 526, 527 (5th Cir.1968); *accord Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir.1990) ("general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Wilson v. Seiter*, 893 F.2d 861, 866 (6th Cir.1990) ("We are aware that state of mind is typically not a proper issue for resolution on summary judgment."), *vacated on other grounds*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199 (2d Cir.1989) ("Questions of intent, we note, are usually inappropriate for disposition on summary judgment"). This is so becuase it is particularly difficult for the moving party to challenge the "self-serving testimony" of the nonmoving party without the benefit of trial accessories, namely cross-examination. *See 60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432 (6th Cir.1987) (observing that "the likelihood of self-serving testimony and the necessity for the fact-finder's credibility determinations" make summary judgment inappropriate when state of mind is at issue). Only through *live* cross-examination can the fact-finder observe the demeanor of a

witness, and assess his credibility. A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: "that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers." *Anderson*, 106 S.Ct. at 2521 (Rehnquist, J., joined by Burger, C.J., dissenting).

This is not to say that the court can never enter summary judgment when intent or state of mind is at issue, only that the court must recognize that undermining the moving party's professed state of mind is not a simple task. Therefore, the court must be vigilant to draw *every* reasonable inference from the evidence in the record in a light most flattering to the nonmoving party. Summary judgment, to be sure, may be appropriate, "[e]ven in cases where elusive concepts such as motive or intent are at issue, . . . if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990); *accord LeFevre v. Space Comm. Co.*, 771 F.2d 421, 423 (10th Cir. 1985). The Supreme Court has observed that "discredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion. Instead, the [nonmoving party] must present affirmative evidence in order to defeat a properly supported motion for summary judgment: *Anderson*, 106 S.Ct. at 2514. The nonmoving party should come forward with evidence, direct or circumstantial, which would allow for the reasonable inference that the

moving party acted with a contrary intent or state of mind. *See Clemente v. Nassau County*, 835 F.2d 1000, 1005 (2d Cir. 1987) ("Where, as here, the circumstantial evidence is so minimal and the legal standard so daunting, summary judgment is appropriate even when state of mind is at issue"). Of course, evidence probative of the moving party's state of mind may be more difficult to procure because it typically is held in the exclusive possession of the moving party.[8]

A nonmoving party, believing that it needs more time to obtain discovery to respond satisfactorily to a motion for summary judgment, can seek the shelter of Rule 56(f) which provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other orders as is just.

Fed.R.Civ.P. 56(f). To obtain a continuance for additional discovery, the nonmoving party must request it from the

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[8] We recognize that in this case, the moving party bears the burden of proof at trial on the issue of state of mind – that it is Rally's' burden to prove its own good faith belief in the colorability of the Arkansas lawsuit, *not* Shortstop's burden of proving Rally's' bad faith (i.e. lack of good faith) in filing the lawsuit. To the extent that summary judgment is rarely appropriate when state of mind is at issue, it is even less fashionable when the *moving party* bears the burden of proving its own state of mind.

district court. *See Childers v. Joseph*, 842 F.2d 689, 693 n. 3 (3d Cir. 1988) (court not obligated to allow for additional discovery absent request from non-moving party). The proper but not only way of requesting additional time for discovery is for the nonmoving party to "present an affidavit containing specific facts explaining [its] failure to respond to the adverse party's motion for summary judgment via counter affidavits establishing genuine issues of material fact for trial." *Barfield v. Brierton*, 883 F.2d 923, 930 (11th Cir. 1989) (citing *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 900 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981).

The nonmoving party's failure to tailor its request for additional discovery to fit Rule 56(f)'s precise measurements does not necessarily foreclose the court's consideration of the request. Although the preferred procedure is to present an affidavit in support of the requested continuance, so long as the nonmoving party indicates to the court by "some equivalent statement, preferably in writing" of its need for additional discovery, the nonmoving party is deemed to have invoked the rule. *Fontenot v. Upjohn Co.*, 780 F.2d at 1194 (citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (*en banc*), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973)); *accord Radich v. Goode*, 886 F.2d 1391, 1399 (3d Cir. 1989) (Hutchinson, J., concurring); *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988). The nonmoving party must show how the additional discovery will defeat the summary judgment motion, this is, will create a genuine dispute as to a material fact, *Washington v. Allstate Insurance Co.*, 901 F.2d 1281, 1286 (5th Cir. 1990), and "may not simply rely on vague assertions

that additional discovery will produce needed, but unspecified facts." *Spence & Green*, 612 F.2d at 901. If the additional discovery will not likely generate evidence germane to the summary judgment motion, the district court may, in its discretion, proceed to rule on the motion without further ado. *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990); *Netto v. Amtrak*, 863 F.2d 1210, 1216 (5th Cir. 1989); *accord Contemporary Mission Inc. v. New York Times Co., Inc.*, 665 F.Supp. 248, 269 (S.D.N.Y. 1987) ("Plaintiffs have not met their burden of showing how the deposition . . . would produce material evidence which would be potentially favorable to them"), *aff'd*, 842 F.2d 612 (2d Cir.), *cert. denied*, 488 U.S. 856, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988).

The district court's discretion to deny the requested extension is not entirely unfettered. Because of the difficulties attendant to rebutting the professed state of mind of a party-opponent through summary judgment evidence, the district court should be generous in its allowance of discovery requests aimed at uncovering evidence of the moving party's state of mind. Oftentimes, as was the case here, the evidence which the nonmoving party could offer to create a factual dispute is in the exclusive possession of the moving party. Where the party opposing the summary judgment informs the court that its diligent efforts to obtain evidence from the moving party have been unsuccessful, "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984) (quoting *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977); *accord*

Snook, 859 F.2d at 871 ("the interests of justice will sometimes *require* a district court to postpone its ruling on a motion for summary judgment") (emphasis added). If, however, the nonmoving party has not diligently pursued discovery of the evidence, the court need not accommodate the nonmoving party's belated request. *C-B Kenworth Inc. v. General Motors Corp.*, 118 F.R.D. 14, 16 (D.Me.1987) ("Only parties who have diligently pursed discovery are entitled to the protections afforded under Rule 56(f).").

The Supreme Court itself has cautioned against granting summary judgment prematurely. In *Anderson*, the Court indicated that the nonmoving party's obligation to respond to a motion for summary judgment "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 106 S.Ct. at 2511 n. 11. The Court stated that the nonmoving party must present affirmative evidence in response to a summary judgment motion, "even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery.*" *Id.* 106 S.Ct. at 2514 (emphasis added).

Although we are reluctant to "substitute our judgment concerning the necessity of a continuance for that of the district court," *Fontenot*, 780 F.2d at 1194, we believe that the district court in this case should have deferred ruling on the motion for summary judgment until the necessary discovery was complete. Although Shortstop did not strictly conform to Rule 56(f)'s procedures, we are satisfied that by its multiple filings *prior to* the court's ruling on the motion for summary judgment, Shortstop

adequately invoked Rule 56(f). In its initial response to the motion for summary judgment, Shortstop noted that several depositions were still outstanding. Later, but *prior to* the court's ruling on the motion for summary judgment, Shortstop thrice sought a continuance of discovery and promptly alerted the district court to the discovery proceedings before the magistrate judge, requesting leave to file a supplemental memorandum in opposition to the motion for summary judgment.

Furthermore, Shortstop explained that the discovery it sought pertained directly to the privilege issue which was the focus of Rally's motion. That the contemplated discovery was material to the summary judgment motion is confirmed by the magistrate judge's ruling in favor of Shortstop on the discovery matters. Shortstop sought evidence of the communications between Rally's and its counsel in connection with the filing of the Arkansas lawsuit. Plainly, that evidence might well shed faith belief that the Arkansas lawsuit asserted a colorable claim.

Moreover, there is no indication that Shortstop was dilatory in seeking the discovery. To the contrary, Rally's consistently interposed its objections to Shortstop's discovery requests on the ground of attorney client privilege. Ultimately, the parties turned to the court for direction.[9] The district judge referred the matters to the magistrate judge, who ruled that Rally's had waived its

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[9] As we indicated in Part I.B. of this opinion, the district court cautioned the parties about approaching the court with discovery disputes. Toward that end, the parties attempted to amicably resolve their dispute. Only after that effort failed did the parties then seek guidance from the court.

attorney client privilege and could no longer object to the disclosure of the evidence that Shortstop requested. Obviously, the delay in obtaining the discovery stemmed from Rally's efforts to cling to its legal position, not from any dilatory tactics by Shortstop.

We conclude that the district court should have allowed Shortstop to complete discovery before proceeding to rule on Rally's motion.[10] Summary judgment is a lethal weapon. We must afford prospective victims some protective armor if we expect them to properly defend against it.

B. Victoria's Secret

In entering summary judgment against Shortstop on its tortious claim, the court canvassed the entire wardrobe of Texas suits on the privilege issue and, after a thorough analysis, concluded that a litigant is privileged to file a lawsuit which interferes with the contract of another so long as the litigant is asserting a "colorable claim," or at least believes in good faith that it is asserting a colorable claim. Recognizing that colorable claims come in many hues, the court did not "attempt to define what showing is necessary to establish conclusively that a claim is objectively colorable." Memorandum opinion at 13. Instead, the court found that the evidence in the record established conclusively that Rally's had filed the

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[10] As we noted at the outset, the district court never ruled on the discovery matters. We express no view on the propriety of the magistrate judge's order regarding the motions to quash and compel. *See supra* note 4 and accompanying text.

Arkansas lawsuit in good faith. Accordingly, the district court held that Rally's had established, as a matter of law, its qualified privilege to file the Arkansas lawsuit.

The district court's interpretation of the nature of the interference privilege turned on its reading of *Sakowitz, Inc. v. Steck*,[11] the leading Texas Supreme Court case on the issue of privilege. In *Sakowitz*, Plaintiff Steck brought suit against her former employer, defendant Sakowitz, Inc., for tortious interference with employment contract. Steck alleged that Sakowitz, Inc. sent a letter to Steck's current employer, Oshman's Sporting Goods, Inc., complaining that Steck's employment was a breach of her prior non-competition agreement with Sakowitz, Inc. The letter to Oshman's threatened Oshman's with a lawsuit: "The letter asked that Oshman's honor the terms of Sakowitz's contract and advised that failure to do so would leave no alternative 'but to consider legal action against your company.' " 669 S.W.2d at 107. Oshman's terminated Steck's employment upon receipt of the letter.

The trial court granted summary judgment for defendant Sakowitz. The Supreme Court of Texas affirmed, holding that Sakowitz had produced sufficient evidence to establish its privilege to assert its claim to the noncompetition agreement; the privilege defeated Steck's claim of tortious interference. Plaintiff Steck, the nonmoving party, had failed to produce evidence sufficient to raise "a fact question regarding the lack of justification for Sakowitz's letter to Oshman's." *Id.* at 108. The court held,

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[11] 669 S.W.2d 105 (Tex. 1984), *overruled in not relevant part, Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989).

therefore, that summary judgment was appropriate. On the question of privilege, the court emphasized that:

> One is privileged to interfere with a contract of another if it is done in the *bona fide* exercise of his own rights or if he has an equal or superior right in the subject matter to that of the plaintiff. This privilege extends to the actual assertion or threatened assertion of rights.
>
> Many lawsuits are asserted even though their validity is not absolute. The uncertainty of a dispute is often the reason that one resorts to the courthouse for resolution. In analogous situations, the failure to prevail after the institution and prosecution of a suit is not regarded as malicious. The basis for the rule is that *good faith litigants* should be assured access to the judicial system. One may not recover in an action for malicious prosecution because the opposing party was mistaken about the strength of a claim.
>
> The similar rule applicable to suits for tortious interference with contracts as stated in *Tidal Western Oil Corp. v. Shackelford*, 297 S.W. 279 (Tex. Civ. App.–Fort Worth 1927, writ ref'd), is:
>
> > It would be a strange doctrine indeed to hold that a person having a well grounded and justifiable belief of a right in or to property may be held liable in damages because of an assertion of such a right.

Id. at 107 (emphasis added and citations omitted).

In *Sakowitz*, the allegedly tortious act was not the *actual* filing of a lawsuit but rather the *threatened* filing of

a lawsuit. The district court considered that to be a distinction without a difference, and concluded, contrary to Rally's' contention, that the filing of a lawsuit is not *absolutely* privileged.[12] The district court reasoned that the *Sakowitz* court explicitly sought to protect only the "bona fide" (i.e. good faith) exercise of one's rights. Accordingly, the district court held that the privilege to file a lawsuit was qualified by a "good faith" requirement.

Although we ultimately decline to define the contours of the "good faith" qualification of the privilege, we note that like the district court, we are not persuaded that Texas law provides for an *un*qualified privilege to file a lawsuit. We see no principled basis for affording the bad faith assertion of rights any greater protection merely

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[12] The district court was not persuaded by the intermediate appellate court decisions holding that a lis pendens is absolutely privileged. *See Prappas v. Meyerland Community Improvement Association*, 795 S.W.2d 794 (Tex. App. 1990, reh'g of writ overruled) (filing of the lis pendens, even if not authorized by statute, is absolutely privileged and "does not turn on the presence or absence of good faith"); *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. 1985, writ ref'd n.r.e.) (lis pendens absolutely privileged). Nor are we. *See Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838 (Tex. App. 1984, error ref'd n.r.e.), *cert. denied*, 474 U.S. 1020, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985) ("Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference."); *Garza v. Mitchell*, 607 S.W.2d 593, 600 (Tex. Civ. App. 1980) ("In order to be tortuous interference with the contract of another the assertion of a right must be without right or justification, and 'the act of interference to be actionable must have been knowingly done without right or justifiable cause.' ").

because the assertion of rights occurs inside the courthouse rather than on the courthouse steps or elsewhere. That a civil compliant carries with it the imprimatur of the docket clerk's seal does not, in our view, make a bad faith lawsuit any less tortious or any more privileged.

In concluding that the privilege to interfere is qualified, the district court declined to subscribe to Shortstop's view that the filing of a lawsuit with malice, that is with tortious intent, undercut the privilege. The district court observed that in its review of the case law, "bad faith nowhere is equated to tortious intent." Memorandum opinion at 12[13]. The court "read[] *Sakowitz* to say that an alleged interferer may claim a privilege as a defense to tortious interference if the allegedly interfering lawsuit was filed in good faith. That means the good faith belief [that] the interfering claim was colorable." *Id.*

Were *Sakowitz* the lockstitch on this issue, we would be inclined to agree that the filing of an interfering lawsuit is privileged if the asserted claim is either colorable or filed in the good faith belief that it is colorable. But we now find ourselves at the regal coronation of *Victoria*, and the district court, not being endowed–as we are not–with clairvoyance, did not anticipate her ruling impact.

In *Victoria Bank & Trust Co. v. Brady*,[14] decided months after the district court entered judgment in this

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[13] The court did find there to be a dispute of fact on the issue of Rally's' motive for filing the Arkansas lawsuit but concluded that Rally's' motivation was immaterial to the privilege question. Memorandum opinion at 14.

[14] 811 S.W.2d 931 (Tex. 1991).

case, the Supreme Court of Texas embroidered upon the legal fabric. There, the counter-plaintiff brought a tortious interference claim against the counter-defendant bank notwithstanding the assertion of the interference privilege. After a jury trial, judgment was entered in favor of the counter-plaintiff on the tortious interference claim. The Supreme Court of Texas affirmed, holding that the counter-defendant bank "did not establish the privilege (or defense) of legal justification or excuse for its 'interference' with the business relationship between" the counter-plaintiff and a business associate. *Id.* at 940.

The case involved banks, money, and cattle. The counter-defendant bank extended counter-plaintiff, Cattle Company (and its principal and business partners), a line of credit to operate its cattle business. This line of credit was secured by a promissory note by the joint ventures, a lien on Cattle Company's cattle, and other collateral not relevant here. The bank also extended Cattle Company a second, separate line of credit which was also secured by a lien in cattle Company's cattle. Cattle Company subsequently became disenchanted with the bank and decided to close out this separate line of credit. Toward that end, Cattle Company paid the debt incurred under the separate line of credit. However, the bank refused to release the lien on the cattle.

Thereafter, Cattle Company sold some cattle to a buyer who paid Cattle Company with a draft drawn on the same bank. When Cattle Company presented the check to the bank for payment, the bank denied payment on the draft until Cattle Company agreed to deduct $40,000 and apply it toward the remaining debt on the promissory note relating to the first line of credit.

Although the bank could have asserted its security interest on the cattle based on the security agreement relating to the first line of credit, the bank claimed a security interest under the security agreement in connection with the separate, already satisfied, line of credit. Under protest, Cattle Company deducted the $40,000 and the bank finally released the security interest on the cattle.

The bank won the race to the courthouse steps and filed suit against Cattle Company and other. The bank's victory in the race to the courthouse was a Pyrrhic one, however: the jury returned verdicts against the bank on all of its claims and in favor of Cattle Company on its counterclaims. In affirming the judgment on the tortious interference claim, the Supreme Court of Texas held that:

> *Even if the Bank asserted a 'colorable legal right'* against the Cattle Company for the proceeds of the [bank] draft, *only good faith assertions of legal rights are protected.* Since the Bank retained the September 21, 1984 security agreement and failed to release the security interest or lien after payment of the debt and asserted the security interest or lien in the cattle sold to [the buyer], *we conclude that there is some evidence that the Bank did not act in good faith when it claimed a security interest or lien in the proceeds of the [bank] draft.*

Id. at 940 (emphasis added). Interestingly, the court was not satisfied that the bank in fact had a valid (hence colorable) claim against Cattle Company in connection with the first line of credit. The court was persuaded that the evidence was sufficient to establish that the bank "did not act in good faith" when it asserted its right to the cattle, a right which it validly could claim. Presumably,

the court concluded that the intentions of the party asserting a claim were germane to the privilege–that it was not enough that the party in fact had a colorable, or even valid, claim, but that the party had to assert its claim in "good faith."

We believe that *Victoria* has ripped a few stitches from the lining of the privilege cloak, but we decline to rethread the needle ourselves. We choose instead to remand this case to the district court to allow it in the first instance to make the necessary alterations, if any. In a case like this one where a district court had granted summary judgment prematurely, the Court of Appeals for the Third Circuit vacated the summary judgment without resolving the delicate state law issues. *See Sames*, 732 F.2d at 52. Instead, the court of appeals remanded, indicating that "[t]he district court . . . remain[ed] free to reconsider its legal holding 'at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties to the district court.' " *Id.* (quoting Fed. R. Civ. P. 54(b)). We believe that the Third Circuit's disposition is tailormade for this lawsuit.

III. READDRESSING

For the reasons stated in this opinion, we VACATE the district court's order granting summary judgment and REMAND this case for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INTERNATIONAL SHORTSTOP, INC. AND SAM TALKINGTON	)	A-89-CA-756
V.	)	[Filed Aug 23, 1990]
RALLY'S INC.	)	

MEMORANDUM OPINION AND ORDER

Before this Court is the Motion of the Defendant Rally's, Inc., for Summary Judgment in the above-captioned cause, along with the Plaintiffs' Response, as well as the Replies and supporting Briefs of both the Plaintiff and the Defendant. Having considered the Motion, Response, and Replies, with the factual premises and legal authorities cited therein, this Court is of the opinion Defendant's Motion should be denied.

I. Factual Allegations

This is a suit between fast-food chains. Plaintiffs Shortstop and Talkington claim Defendant Rally's tortiously interfered with Plaintiff's efforts to secure a buyout of its chain. Defendant allegedly accomplished this interference by disparaging Plaintiff Shortstop to a prospective purchaser, and also by filing a frivolous infringement lawsuit against Plaintiff Shortstop in another forum in order to make the same prospective purchaser believe buying Shortstop outlets would be buying trouble.

Plaintiffs' account of the facts, in condensed form, is as follows. Sam Talkington ("Talkington") of International Shortstop, Inc. ("Shortstop"] began talking with Al Copeland ("Copeland") in late August of 1988 regarding Copeland's purchase of Shortstop. During the summer and fall of that year Talkington and Copeland had further conversations, and other officers of their respective companies worked out several significant details regarding the prospective purchase. A closing was contemplated some time in 1988, but complications prevented its occurrence. Concerned about the delay in light of Shortstop's financial condition, Shortstop officers considered at least one other offer for the purchase of Shortstop. However they allegedly made such consideration contingent upon failure of the pre-existing deal with Copeland.

On or about March 1, 1989, Richard F. Sherman ("Sherman") of Rally's had a conversation with Copeland in which Sherman made disparaging remarks about Shortstop, but did not mention the prospect of a trade dress lawsuit against any Shortstop store. On or about March 7, 1989, Sherman inquired of Jim Flynn, president of Copeland Enterprises, regarding the progress of negotiations for the purchase of Shortstop. Between March 7 and March 17, 1989, Sherman contacted the law firm representing Rally's regarding the need to move forward with a trade dress infringement lawsuit against a Shortstop store in Arkansas. On or about March 17, a lawyer from that firm contacted Talkington and advised him of Rally's plan to file the lawsuit against Shortstop, and that the firm would not represent Rally's in the matter because of conflicts arising from their representation of Shortstop.

On or about March 22, 1989, Sherman and Talkington conversed about the lawsuit. Sherman advised Talkington that Rally's had filed a suit on March 20th, and that the suit had nothing to do with Talkington's deal with Copeland. On or about March 22, Sherman also told Flynn of Rally's lawsuit against Shortstop. However Rally's did not actually file its lawsuit until March 23, 1989. That suit named as defendant one Shortstop franchise in Little Rock, Arkansas. On March 31, Talkington and Sherman met to discuss settlement of the lawsuit. Sherman demanded changes in the characteristic Shortstop building layout and menu, which changes Talkington believed Copeland would not approve. Sherman later retracted demands regarding changes in the Shortstop menu, but pressed demands for alterations in the physical layout.

Copeland subsequently acknowledged Rally's filing of its Arkansas lawsuit diminished the value of Shortstop to Copeland, because prospective franchisees would not invest in a company facing trade dress litigation. Copeland's lawyer advised him not to purchase Shortstop because of the Rally's lawsuit. Copeland thereafter refused to close the Shortstop purchase. Shortstop and Talkington filed this lawsuit against Rally's in September in state court and the suit was subsequently removed to this Court. Thereafter, Rally's amended its Original Complaint in the Arkansas litigation to name other existing Shortstop stores in Shreveport, Louisiana and Miami, Florida.

Defendant's version of the facts is not substantially different from Plaintiffs' version. Defendant points out, however, that its infringement suit against the Little

Rock, Arkansas Shortstop was contemplated, and preliminary actions taken, months before the suit was actually filed and also before Copeland and Talkington had commenced negotiations. Defendant questions whether conditions precedent, having to do with Copeland's financing of the purchase, remained unresolved and therefore whether the alleged deal was ever substantially consummated. Defendant also questions whether, based on Talkington's consideration of another offer for the purchase of Shortstop, Talkington intended to close the deal with Copeland or abandon it altogether. Defendant also contends, in the event any tortious interference occurred, Talkington's eventual sale of Shortstop to another purchaser negates the claim of damages from that interference.

II. Defendants' Claim of Privilege

Defendant contends it was legally privileged in filing its trade dress infringement lawsuit against Shortstop in Arkansas, and consequently Defendant's conduct in filing the Arkansas suit may not be the basis of a cause of action for tortious interference with contract or business relations. Privilege, in Defendant's view, is an absolute affirmative defense to Plaintiff's suit. Thus Defendant cannot be sued for tortious interference predicated on that lawsuit regardless of whether it filed that lawsuit in good faith. Alternatively, if good faith is a requirement for asserting the privilege, Defendant claims it filed the Arkansas lawsuit in good faith.

The general rule in Texas is, one has a qualified privilege to interfere with a contract of another if the

alleged interferor can show either (1) that he has an equal or superior right to that of the plaintiff in the subject matter of the contract, or (2) the interference is done in the bona fide exercise of his own rights.[1] The privilege extends to both threatened assertion and actual assertion of rights.[2] Claims may be subject to the privilege even though their validity is not absolute as a matter of law, so long as the holder has a good faith belief in his superior right.[3]

The party asserting privilege as an affirmative defense to a tortious interference claim has the burden of proving the elements of privilege. To prevail on a motion for summary judgment as to that affirmative defense, a defendant must prove each element of the defense by uncontroverted or otherwise conclusive summary judgment evidence.[4] In the case at bar, the parties diverge in their understanding of the elements required to sustain the defense of privilege when a tortious interference claim is predicated on the act filing a lawsuit. The parties do not dispute the allocation of the burden of proof, but they differ regarding what elements a defendant must prove by uncontroverted summary judgment evidence in

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[1] *Sterner v. Marathon Oil Company*, 767 S.W.2d 686, 691 (Tex. 1989); *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 107 (Tex. 1984), *citing Black Lake Pipe Line Company v. Union Construction Company*, 538 S.W.2d 80, 91 (Tex. 1976).

[2] *Sakowitz*, 669 S.W.2d at 107.

[3] *Id.*

[4] *Chapman v. Mitsui Engineering and Shipbuilding Co., Ltd.*, 781 S.W.2d 312 (Tex.App. – Houston 1989, writ denied), *citing Sterner v. Marathon Oil Company*, 767 S.W.2d 686 (Tex. 1989); *Sakowitz*, 669 S.W.2d 105.

order to establish the privilege. Texas opinions in similar cases manifest tension between policies favoring open access to courts for prospective litigants, and discouraging litigation undertaken "in bad faith for the purpose of causing damage or loss."[5]

Plaintiffs contend, in order to assert the defense of privilege to a tortious interference, Defendant must conclusively prove a colorable claim, and subjective "good faith" on the part of the person filing the claim. Thus, according to Plaintiff, privilege requires a showing the Defendant's claim was colorable, and the Defendant filed the claim with a subjective state of mind unclouded by bad faith which, from Plaintiff's brief, Plaintiff appears to equate with tortious intent.

One Texas court observed that "[l]itigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference. . . ."[6] That observation was made in the same year the Texas Supreme Court issued its opinion in *Sakowitz, Inc. v. Steck*.[7] Though overruled regarding its allocation of the burden of proving the privilege defense, *Sakowitz* still appears to state Texas' substantive law of privilege as a defense to a claim of tortious interference predicated on the filing of a lawsuit. Examination of the *Sakowitz* opinions, of both the majority and the dissent, helps to clarify the elements of the privilege.

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[5] *Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838 (Tex.App. – Houston 1984, writ ref'd n.r.e.).

[6] *Hughes*, 680 S.W.2d at 842.

[7] 669 S.W.2d 105 (Tex. 1984).

Sakowitz, a department store, wrote a letter to the employer of Steck, one of Sakowitz's former employees, threatening to sue the employer for tortious interference with contract. Sakowitz asserted its right under an alleged non-competition contract with Steck as grounds for its interference with Steck's new employment. The summary judgment proof established, however, Steck never actually signed the written non-competition contract, although she knew the terms of the contract.

Disposition of the case turned on who had the burden of proof on summary judgment with respect to the justification defense. The dissenting Justices in *Sakowitz* correctly stated the rule on that point.[8] Under the Texas Rules of Civil Procedure, defendant moving for summary judgment on the basis of an affirmative defense must conclusively prove all essential elements of that defense.[9] Sakowitz's attorney had filed an affidavit to the effect the allegedly interfering letter was sent "in the good faith belief" Sakowitz had a legal right to interfere with the plaintiff's contract because of the alleged noncompetition agreement.[10] The dissenting justices considered this letter insufficient to conclusively establish the affirmative defense as a matter of law.

Both the majority and the dissent applied the same law of qualified privilege.[11] The majority stated the law as follows:

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[8] *Sterner v. Marathon Oil Company*, 767 S.W.2d 686, 690 (Tex. 1989).

[9] Sakowitz, 669 S.W.2d at 109.

[10] *Id.* at 107.

[11] *Citing Black Lake*, 538 S.W.2d 80 (Tex. 1976).

> One is privileged to interfere with a contract of another if it is done in the bona fide exercise of his own rights or if he has an equal or superior right in the subject matter to that of the plaintiff.[12]

The dissent used the following, slightly different language:

> . . . the claimed privilege . . . can only be sustained if the interferor can show either: (1) that he has an equal or superior right to that of the plaintiff or, (2) he has a good faith belief that such a superior right exists.[13]

In dicta, the dissent noted "[t]he summary judgment evidence of legal justification and *good faith* is equally defective."[14] And again, "the evidence is not conclusive but raises an issue of fact on Sakowitz's *good faith* and legal justification."[15] The majority likewise stated, "[t]he basis for the rule (of privilege) is that *good faith* litigants should be assured access" to the legal system.[16]

At another point, however, the majority opined Sakowitz was privileged to assert its claim to the non-competition agreement grounded on estoppel or oral contract even though that claim was doubtful, "so long as it asserted a colorable legal right."[17] That statement implies

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[12] *Sakowitz*, 669 S.W.2d at 107.

[13] *Id.* at 109.

[14] *Id.* at 109 (emphasis added).

[15] *Id.* at 110 (emphasis added).

[16] *Id.* at 107 (emphasis added).

[17] *Id.*

the "good faith belief" prong of the justification defense might be established objectively by a showing of a colorable legal right, though the nature of the showing required to establish what is "colorable" was left open to speculation.

The majority believed Sakowitz's offer of the attorney's affidavit sufficed to put plaintiff to her proof of lack of justification.[18] But in regard to the elements of the privilege defense, the attorney's affidavit alleged good faith, as well as belief in Sakowitz's legal right. Therefore, the majority, in allocating the burden as it did, had no reason to decide whether an affidavit alleging belief in the legal right alone, absent good faith, would suffice. As noted, certain dicta from both the majority and the dissenting Justices suggest the court believed "good faith belief" to be a necessary element of the privilege. But the necessity of the good faith belief, and the parameters of that element, were not issues the *Sakowitz* court had to decide.

Sakowitz dealt with a claim based on the threat to file a lawsuit. Besides *Sakowitz*, few cases have dealt with tortious interference predicated on the act of actually filing a lawsuit. Dicta from certain other cases indicate good faith to be a necessary element for asserting the privilege, though the Court finds no case distinctly and specifically adjudicating whether good faith was present.

In *Hughes v. Houston Northwest Medical Center*[19] the court of appeals had before it a claim for tortious

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[18] This allocation of the burden was the majority's error according to the *Sterner* court.

[19] 680 S.W.2d 838.

interference predicated on the filing of a shareholder derivative lawsuit. Emphasizing that litigation "when instituted in bad faith for the purpose of causing damage or loss" constitutes wrongful interference[20] the court of appeals upheld a verdict imposing liability for interference predicated on the filing of the shareholder suit. Furthermore, in passing on the question of privilege regarding the allegedly tortious giving of testimony in an administrative proceeding, the court limited the defense of absolute privilege to claims for libel and slander, and did not find an absolute privilege in a claim for tortious interference.[21]

In *Garza v. Mitchell*[22] the defendant raised privilege in defense against a tortious interference claim predicated on the filing of a suit to obtain injunction of a certain transaction. The Court of Appeals, in upholding a judgment in favor of the party asserting privilege, stated, "[i]n order to be tortuous [sic] interference . . . the act of interference to be actionable must have been knowingly done without right or justifiable cause."[23] Further, in *Hahn v. A.O. Smith Corp.*[24] a Federal court interpreted Texas law affording privilege to a threat of litigation so long as the alleged interfering party "acted in good faith; that is, believing [itself] entitled to legal protection and

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[20] *Id.* at 842.

[21] *Id.* at 843.

[22] 607 S.W.2d 593 (Tex.Civ.App. – Tyler, no writ).

[23] *Id.* at 600, citations omitted.

[24] 320 F.2d 166 (5th Cir. 1963).

motivated by the belief" that the actions interfered with would impair the interfering party's rights.[25]

According to Defendant's view of the law, the litigation privilege constitutes an absolute defense. It appears to the Court Defendant's notion that all lawsuits are absolutely privileged[26] in a tortious interference claim would make it impossible to sustain such a claim where the interfering act was the filing of a lawsuit, even one taken without the belief in the existence of a colorable claim. Further, the dicta on which Defendant relies in making this point[27] seem to create a slippery slope terminating in the absurd result that the filing of a lawsuit is absolutely privileged in a suit for malicious prosecution. It does not appear to the Court Texas "access to courts" policy goes this far.

Texas cases plainly say statements made in a judicial proceeding are absolutely privileged in a libel, slander or defamation action.[28] Texas cases also say, in a tortious interference action, the filing of a lis pendens claim is absolutely privileged[29] but the filing of a lawsuit is

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[25] *Id.* at 169.

[26] This is the view set out in *Prappas v. Meyerland Community Improvement Association*, 1990 WL 88999 (Tex.App. – Houston 1990, no writ), and strenuously argued by the Defendants.

[27] *Id.*

[28] *See Hughes*, 680 S.W.2d 838.

[29] It appears to the Court Texas law gives particular protection to the filing of a lis pendens claim because lis pendens is an auxiliary remedy supplementing an underlying lawsuit, is specifically authorized by statute, and protects important

(Continued on following page)

subject to a qualified privilege.[30] The Court acknowledges Texas appellate court cases contain dicta suggesting an absolute privilege attaches to the filing of any judicial proceeding, and thus creating the appearance of a split of authority among Texas appellate courts on the nature and parameters of the litigation privilege. However the Texas Supreme Court's operative pronouncement on this question is found in the Sakowitz opinion, which makes the filing of litigation a qualified privilege in defense of a claim for tortious interference.

The nature of "good faith" required for asserting the privilege is not readily apparent from the parties' briefing. It seems evident to this Court "colorable claim" and "bad faith" are not mutually exclusive. A legal claim at once may be both colorable and infected with bad faith. Further, uncertainties of law and fact lead to the result one may have an objectively colorable claim and still assert that claim without good faith belief that it is colorable. Of course, in this Court's view of the case law, "bad faith" nowhere is equated to "tortious intent."

This Court reads *Sakowitz* to say an alleged interferor may claim qualified privilege as a defense to tortious

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(Continued from previous page)

public interests in disputes over real property. It is absolutely privileged and cannot be the predicate of an action for slander of title or an action for tortious interference with contract. Lis pendens appears thus more deserving of the protection of an absolute privilege than the underlying lawsuit itself.

[30] *Sakowitz, Inc. v. Steck; See also Terry v. Zachry*, 272 S.W.2d 157 (Tex.Civ.App. – San Antonio 1954, writ ref'd n.r.e.) (qualified privilege to assert legal defense); *Garza*, 607 S.W.2d 593 (qualified privilege to sue for injunction).

interference if the allegedly interfering lawsuit was filed in good faith. That means the good faith belief the interfering claim was colorable.[31] Alternatively, it also appears an interferor may claim privilege as a matter of law if the claim was objectively "colorable." The Court, however, does not find it necessary in the case at bar to attempt to define what showing is necessary to establish conclusively that a claim is objectively colorable.[32]

Essentially, Texas cases seem to make out two grounds for a claim of privilege. One such ground is the existence of a superior right of the interferor in the contract interfered with. This ground is not relevant in the case at bar, because Defendant claims no superior right in reference to the contract or agreement with which Defendant allegedly interfered. The other ground is the bona fide exercise of the interferor's rights. That ground could be established by showing – conclusively showing by a defendant on motion for summary judgment – the allegedly interfering lawsuit was filed in the good faith

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[31] Dicta in *Garza* support this conclusion. In that case, the interfering act was the filing of a lawsuit to obtain an injunction. The *Garza* court stated, "the act of interference to be actionable must have been knowingly done without right or justifiable cause." *Id.* at 607. The *Garza* court further reasoned the privilege defense does not require a showing of an absence of subjective "malice," as that element is defined for the purpose of establishing the elements of tortious interference. *Id.*

[32] The Court is not entirely convinced denial of a motion for directed verdict as to a claim makes that claim colorable within the meaning of the law of privilege. Some judges might deny directed verdict motions as to tenuous claims for reasons of judicial economy. One wonders, in marginal cases, who evaluates claims "objectively."

belief it asserted a colorable claim. Accordingly, it appears the Defendant, to sustain its claim of privilege on its Motion for Summary Judgment, must show conclusively Defendant filed the Arkansas lawsuit in the good faith belief that lawsuit stated a colorable claim.

Plaintiff makes much of summary judgment evidence regarding the likelihood Rally's harbored tortious intent at the time it filed the Arkansas lawsuit. The Court believes Plaintiff's summary judgment evidence indeed raises a fact issue regarding the existence of such intent. The Court, however, does not believe that summary judgment evidence relevant to the issue of privilege.

To prevail on its defense of privilege, Rally's must have filed its Arkansas lawsuit in the good faith belief its claim in that suit was colorable. Shortstop makes numerous allegations and references to summary judgment evidence tending to show contested issues of fact regarding the viability of the Arkansas suit. However, it appears to the Court the good faith requirement in this case requires analysis of the Defendant's intent at the time the Arkansas suit was filed. The Court does not regard the objective viability of the claims in that suit to be dispositive of the privilege issue.

This Court finds no substantial showing to counter Defendant's assertion Defendant filed the Arkansas lawsuit based on the good faith belief Defendant stated a colorable claim. In short, Shortstop has failed to controvert Rally's assertion, and summary judgment evidence, tending to establish Rally's filed that suit in the good faith belief it had a colorable claim. The Court therefore

regards Defendant Rally's defense of privilege conclusively proved.

III. Defendants' Motion on the Merits

When a motion for summary judgment is made and supported as provided in the Federal Rules of Civil Procedure, an adverse party must come forth with specific facts showing that there is a genuine issue for trial. The focus of the Court is upon disputes over material facts. A genuine dispute over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment.[33]

The Supreme Court's 1986 trilogy of summary judgment cases clarified the test for granting summary judgment. In *Anderson v. Liberty Lobby*, the Court stated that the trial court must consider the substantive burden of proof imposed on the party making the claim. In the case at bar, the Plaintiffs have the burden with respect to their claim and the Defendants have the burden with respect to certain defenses they raise. The Court in *Anderson* defined "material" as involving a "dispute over facts which may affect the outcome of the suit under the governing law." Essentially, then, a dispute must exist over the facts tending to establish each element necessary to sustain the Plaintiff's claim. This Court must substantively evaluate the evidence offered by the moving and non-moving

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[33] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 152, 98 L.Ed.2d 107 (1987), and the cases cited therein.

party to determine whether the evidence raises a "material" fact question which is "genuine."

Where the moving party establishes prima facie that there is no genuine issue as to any material fact, the non-moving party must then come forward with "specific facts" showing a genuine issue for trial. It must be "more than simply . . . that there is some metaphysical doubt as to the material facts."[34] Where the moving party shows that the opposing party is unable to produce evidence in support of its case, summary judgment is appropriate.[35] It is not necessary for the motion for summary judgment to be supported by affidavits or other material specifically negating the non-moving party's claim so long as the Court is satisfied that there is an absence of evidence to support it. At that point the burden shifts to the non-moving party to produce evidence in support of its claims; if it does not produce any, summary judgment was required.

In response to Defendant's Motion in the case at bar, Plaintiff must show there exists a genuine issue of material fact regarding the elements of tortious interference with contractual relations: the existence of a contract or prospective contract subject to interference; an act of willful and intentional interference with that contract; proximate cause; and actual damage.[36] The Court will address those elements.

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[34] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 477 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986).

[35] *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

[36] *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 33 Tex. Sup. Ct. J. 530, 533 (June 9, 1990).

No written contract existed between Copeland and Shortstop, and Defendant particularly contends the status of communications between them did not involve sufficient certainty to create a "meeting of minds" and a binding agreement. Plaintiff points out, and this Court agrees, the existence of a contract and certainly the parties' intent to contract ordinarily is a question for the trier of fact.[37] The Plaintiffs' Brief points out several issues of fact regarding contract formation in this case, and the Court believes Plaintiff has sustained its burden on this element of its claim. In any event, it also appears Texas' protection of prospective, as well as existing, contracts supports Plaintiffs' contentions regarding this element.[38]

As to the existence of willful and intentional interference, it appears Plaintiffs must show Defendants had the design to interfere with the arrangement between Copeland and Talkington.[39] The Court again agrees with Plaintiff the summary judgment evidence contains sufficient circumstantial evidence of the requisite intent to create a genuine issue. The Court does not consider Defendants' bona fides in filing the Arkansas litigation entirely dispositive of the issue of tortious intent. The Court believes Plaintiff alleged other acts that properly raise the issue of willful and intentional interference.

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[37] *Haws & Garrett General Contractors, Inc. v. Gorbett Brothers Welding Co.*, 480 S.W.2d 607 (Tex. 1972).

[38] *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989); *Martin v. Phillips Petroleum Company*, 455 S.W.2d 429 (Tex.Civ.App. – Houston 1970, no writ).

[39] *Armendariz v. Mora*, 553 S.W.2d 400 (Tex.App. – El Paso 1977, writ ref'd n.r.e.).

Regarding the elements of proximate cause and damages, the Court finds pertinent issues of fact particularly difficult to resolve on summary judgment. These elements largely involve the existence and substantiality of communications, negotiations, and offers the Plaintiff may have exchanged with other entities, and raise difficult factual questions the Court prefers to leave to the trier of fact. Accordingly,

IT IS ORDERED the Motion of the Defendant for Summary Judgment in the above-captioned cause is hereby DENIED.

IT IS FURTHER ORDERED the Defendants brief the Court and the United States Magistrate within 10 days regarding Plaintiffs' proposal as to the proper method of curtailing discovery and trial testimony in reference to the facts surrounding Defendants' filing their Arkansas lawsuit as an act of tortious interference.

SIGNED this 21st day of August, 1990.

/s/ Lucius D. Bunton
Lucius D. Bunton,
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INTERNATIONAL SHORTSTOP, INC. and SAM TALKINGTON	)	A-90-CA-756
	)	(Filed
V.	)	Sept. 17, 1990)
	)	
RALLY'S, INC.	)	

ORDER

BEFORE THIS COURT is the Motion of the Plaintiffs for Clarification and Reconsideration or, in the Alternative, Motion for Certification of Immediate Appeal, along with the Plaintiffs' Supplement thereto, and the Motion of the Defendant for Reconsideration of August 23, 1990 Memorandum Opinion and Order. Upon consideration of the parties' Motions, the Court is of the opinion Plaintiffs' Motion for Clarification and reconsideration should be denied, Plaintiffs' Motion for Certification should be denied, and Defendant's Motion for Reconsideration should be granted.

The Court is now of the opinion Defendant's Motion for Summary Judgment should be granted in its entirety as to Plaintiff's claims for tortious interference with contract or prospective contract based on the Defendant's acts of filing and maintaining the Arkansas lawsuit, and uttering disparaging statements regarding the Defendant's stores. Accordingly,

IT IS ORDERED Defendant's Motion for Reconsideration of August 23, 1990 Memorandum Opinion and Order is hereby GRANTED.

IT IS FURTHER ORDERED Defendant's Motion for Summary Judgment is hereby in all-things GRANTED. The Court shall enter forthwith its separate Judgment.

SIGNED this 13th day of September, 1990.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INTERNATIONAL SHORTSTOP, INC. and SAM TALKINGTON	)	A-89-CA-756 (Filed Sept. 17, 1990)
V.	)	
RALLY'S, INC.	)	

JUDGMENT

BEFORE THIS COURT came on to be heard this date the above-captioned cause on the Motion of Defendant, Rally's, Inc., for Reconsideration of this Court's previous Order denying Defendant's Motion for Summary Judgment. The Court, in consideration of the Motion, the Response of Plaintiffs thereto, and the summary judgment evidence filed by the parties, determined the Defendant's Motion to Reconsider should be granted and summary judgment should enter for the Defendant. A separate Order granting Defendant's Motion was signed by the Court. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED the Clerk of the Court enter Judgment for the Defendant in the above-captioned cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Plaintiffs take nothing by their suit.

IT IS FURTHER ORDERED costs of Court be taxed against the Plaintiffs.

IT IS FURTHER ORDERED Defendant shall brief the Court on its claim, if any, for attorney's fees in this cause,

including the legal basis therefor, the affidavits in support thereof, and the basis for the amount claimed according to the standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Defendant shall file its claim, if any, affidavits, and brief within 10 days of the entry of this Judgment. Plaintiffs shall file their response, if any, in opposition to Defendant's claim within 10 days of the date Defendant's claim is entered.

SIGNED this 13th day of September, 1990.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8563

INTERNATIONAL SHORTSTOP, INC., ET AL.,

Plaintiffs-Appellants,

versus

RALLY'S, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(OCTOBER 11, 1991)

Before GOLDBERG, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

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§ 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

(2)

No. 91-824

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

RALLY'S INC.,

Petitioner,

vs.

INTERNATIONAL SHORTSTOP, INC., AND SAM TALKINGTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 91-824

In The

Supreme Court of the United States

October Term, 1991

RALLY'S INC.,

Petitioner,

vs.

INTERNATIONAL SHORTSTOP, INC., AND SAM TALKINGTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

Petitioner Rally's, Inc. ("Rally's") is trying to make much over nothing. As to Rally's first issue, asserting the existence of a purported conflict among the circuits about the weight to be given intermediate state appellate court opinions, the two intermediate state court opinions that supposedly should have been followed by the Fifth Circuit did not even decide the state law question presented here, and numerous other authorities, including Texas Supreme Court opinions, support the Fifth Circuit's holding about state law. As to the second issue, concerning a

conflict about the necessity for a Rule 56(f) affidavit, an affidavit was filed in this case.

I.

There Is Not A "Wide Split" Among The Circuits About Whether To Follow State Intermediate Appellate Court Decisions, As Petitioner Rally's Alleges, And Several Other Reasons Also Dictate Denial Of The Writ On This Issue.

Both the circuit and district courts in this case rejected Rally's contention that Texas law provides an absolute privilege defense for tortious interference with a contract by the filing of a lawsuit. Rally's nonetheless continues its quest for absolute privilege protection before this Court by mischaracterizing Texas law. It ignores controlling precedent emanating from the Texas Supreme Court and from intermediate appellate courts, erroneously asserts that two distinguishable intermediate appellate court decisions concerning the filing of lis pendens notice are determinative of Texas law and should have been followed by the circuit and district courts, then wrongly represents that there is a "wide" and "substantial" conflict among the circuits about the consideration given by federal courts to intermediate state appellate court decisions.

There is *not* a conflict among the circuits. Moreover, the circuit and district courts correctly rejected Rally's "absolute privilege" contention. For these and other reasons delineated below, Rally's petition for writ of certiorari should be denied.

A. There Is No Split Among The Circuits About The Consideration Given To Intermediate State Appellate Court Decisions.

Rally's discusses principles enunciated by this Court in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). There, the federal circuit court declined to follow an intermediate state appellate court opinion on the same issue decided in an earlier phase of the same litigation. 311 U.S. at 231, 233-34. This Court said,

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former to ascertain *from all the available data* what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. . . .
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, *that is a datum for ascertaining state law* which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

311 U.S. at 236-37 (all emphasis added unless otherwise noted).

Rally's cites *West* for the proposition "that a federal court is particularly bound to follow a state intermediate appellate court decision when the highest state court has refused to review the appellate court decision. *Id.* [at 237]." Petition, p. 9. Rally's then points out that the Texas Supreme Court declined review in one of the two distinguishable opinions on which it mistakenly relies. However, Rally's has misinterpreted *West* on this issue. Rather than the broad proposition asserted by Rally's, this Court held,

> This [weight to be given an intermediate state appellate court decision] is the more so where, as in this case, the highest court has refused to review the lower court's decision *rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.*

311 U.S. at 237.

None of the circuit court opinions cited by Rally's contradict *West*, nor do the opinions exhibit a conflict among themselves. Petition, pp. 6-7. Most of the opinions cite *West* and reiterate its guiding principles, although at times in somewhat different wording. All of the opinions recognize that an intermediate state appellate court decision is a "datum" or indicator of state law which is to be considered when evaluating how the highest state court likely would decide an issue. Not surprisingly, the circuit courts sometimes have found a prior intermediate state appellate court decision to be compelling precedent and

sometimes they have not, usually either because the earlier decision was distinguishable or because other authorities convinced the court that the highest state court probably would decide the issue differently.

Rally's divides most of the circuits into supposedly distinct categories. It begins,

> Some of the United States Courts of Appeal, including the Second [sic], Fourth, and Seventh Circuits, have ruled that a federal court in a diversity action is *not* required to follow holdings of intermediate forum state appellate courts in the absence of a forum state's highest court decision on point. *See, e.g., Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1275 (2nd [sic] Cir. 1990); *Klippel v. U-Haul Co. of Northeastern Michigan*, 759 F.2d 1176, 1181 (4th Cir. 1985); *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990); *but see, Burrus v. Young*, 808 F.2d 578, 581-86 (7th Cir. 1986).

Petition, pp. 6-7 (emphasis in original).

Rally's over-generalizes the holdings in the cited opinions. None of the courts unequivocally adopted the proposition stated by Rally's. Conversely, however, *no* court has held that a prior state intermediate court opinion, which usually is being advanced by one party to the suit, must be blindly followed without considering whether it may be distinguishable, outdated, or for some other reason not indicative of the highest state court's likely decision. In *Ground Air Transfer*, for example, the First Circuit (not the Second Circuit, as identified in Rally's petition) held that prior intermediate state court

authority argued by a party to be applicable was distinguishable and, in any event, contrary to state statutory policy and thus not the highest state court's likely ruling. 899 F.2d at 1270, 1273-75. In *Klippel*, the Fourth Circuit declined to follow a prior intermediate state court decision because it appeared to diverge from opinions of the highest state court and had been criticized as "probably erroneous" in law review articles. 759 F.2d at 1181. The Seventh Circuit in *Indiana Harbor Belt* was confronted with a novel state law issue, and it found that discussions about that issue in two prior state intermediate court opinions were dicta and were based on an incorrect interpretation of a prior district court opinion in the case under review. 916 F.2d at 1176.

Rally's next "category" of cases is described as follows:

> Some of the Circuit Courts, including the Seventh, Tenth and Eleventh Circuits, have ruled that a federal court in a diversity action *must* follow forum state intermediate appellate court decisions. *See, e.g., Burrus v. Young*, 808 F.2d 578, 581 (7th Cir. 1986); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986); *Blanchard v. State Farm Mut. Auto Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990).

Petition, p. 7 (emphasis in original). Rally's again leaves a misimpression by its over-generalization. In *Burrus*, a habeas corpus case, the Seventh Circuit merely noted generally that the Wisconsin Court of Appeals in the underlying criminal appeal had decided a state law evidentiary question and that the parties agreed they were

"bound by the Wisconsin Court of Appeals' interpretation of state [evidence] law." 808 F.2d at 581. The Tenth Circuit in *Weiss* confronted a novel question of state law, without the benefit of any state appellate court decisions on point; the court observed that "[i]n predicting how a state's highest court would rule, federal courts must follow intermediate state court decisions, policies underlying the applicable legal principles, and the doctrinal trends indicated by these policies," as well as "policies, principles, and state court decisions on analogous areas of Colorado law. . . . " 787 F.2d at 525. In *Blanchard*, the parties stipulated that there was no controlling state appellate authority on the state law question in that case; the Eleventh Circuit noted a "division in the reasoning among" the intermediate state court decisions and certified the question to the state's highest court. 903 F.2d at 1399.

Rally's next "category" of circuit court opinions are cited for the proposition "that [a] forum state's intermediate appellate court decisions must be followed by a federal court sitting in diversity absent convincing evidence that the state's highest court would decide the issue differently." Petition, p. 7. Again, however, none of the holdings in the cited opinions conflict with the holdings in the decisions previously discussed. *McGowan v. University of Scranton*, 759 F.2nd 287, 290-91 (3rd Cir. 1985) (In deciding novel question of state law, federal court must forecast state law by considering "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data," and intermediate appellate court decisions are "not conclusive" but are "indicia of how the state's highest court might decide"

the question); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140-41 (6th Cir. 1986); *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771-72 (9th Cir. 1985).

Finally, Rally's contends that the Fifth Circuit "is itself apparently split on this question," and it compares *Lavespere v. Niagra Machine & Tool Works, Inc.*, 920 F.2d 259 (5th Cir. 1990), with *Green v. Walker*, 910 F.2d 291 (5th Cir. 1990). Both of those opinions involved questions about Louisiana law, and both were authored by judges who had practiced in Louisiana and were familiar with Louisiana law. In *Lavespere*, several intermediate state court opinions espoused by one party were found to be distinguishable. *Lavespere*, 920 F.2d at 260-61. In *Green*, the court observed that it was not bound by a prior intermediate state court decision when there is "persuasive data that the highest court of the state would decide otherwise," and that this is particularly so in Louisiana where the principle of *stare decisis* is not considered controlling. *Green*, 910 F.2d at 294.

B. Rally's Did Not Previously Raise Any Complaint About A Purported Conflict And Never Gave The Court Of Appeals The Opportunity To Address This Claim.

Rally's removed this case to federal court from Texas state court, presumably preferring a federal forum for the adjudication of this Texas tortious interference lawsuit, but now at this late juncture raises for the first time a complaint about a supposed conflict among the circuits regarding the weight to be given to intermediate state court decisions. The Fifth Circuit in this case invited

briefs on the question of adherence to intermediate state court opinions, and the parties submitted briefs. Yet Rally's did not assert the existence of a conflict in either this brief or in its petition for rehearing. The failure to complain about this issue in the circuit and district courts further confirms that certiorari is not warranted.

C. Rally's Petition Is Wrong About Key Facts.

Several critical facts are omitted from or distorted by the factual statement in Rally's petition. Rally's fails to mention the summary judgment evidence demonstrating that Plaintiff-Respondent International Shortstop, Inc. ("Shortstop") began a fast food business with a distinctive "double drive-through" design *before* Rally's started a competing business. (R. 2008, 2010, 2225, 3224-25). Shortstop made an agreement to sell its fast food chain to Al Copeland of Al Copeland Enterprises, Inc., the owner of Popeye's, Inc. and Church's Fried Chicken, Inc. (R. 55, 1894-95, 1924-25, 2036, 2221). Although Rally's petition (p. 4) implies there was no agreement, both the district and circuit courts found that an agreement did exist. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1260 (5th Cir. 1991). This agreement was a double blow to Rally's: it would give a financial "shot in the arm" to Shortstop, a direct competitor (R. 2224), and it dimmed Rally's hopes of acquiring prime surplus franchise locations from Copeland. (R. 1998, 2110, 2685).

Rally's solution was to make denigrating comments about Shortstop to Copeland and to summarily file a frivolous trade dress lawsuit in a federal court in Arkansas. (R. 1961, 1983-84, 2222-23). As a result of the

Arkansas lawsuit filed by Rally's, Copeland refused to close on the contract and consummate the purchase of Shortstop. (R. 1900). Copeland testified that the Arkansas lawsuit interfered with the deal and adversely affected Shortstop's value and its expansion potential because prospective franchisees would refuse to invest in a company involved in litigation. (R. 1901, 1912-13). After the district court rendered summary judgment for Rally's in this suit, the United States District Court in the Arkansas suit issued an opinion finding against Rally's on all elements of Rally's tortiously interfering trade dress claim. (Brief of Appellant, Exhibit A). Following the Fifth Circuit's reversal and remand for trial in this case, the district court's judgment against Rally's in the Arkansas suit was affirmed by the Eighth Circuit in an unpublished opinion.

This fact-based controversy does not present any appropriate question for this Court.

D. The Fifth Circuit Correctly Followed Texas Tortious Interference Law.

Rally's claim that it is absolutely privileged to tortiously interfere by filing a lawsuit contravenes established Texas law, and the circuit and district courts properly so held. Those holdings are grounded in Texas Supreme Court opinions, intermediate court opinions, and other authorities.

In *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984), the Texas Supreme Court discussed the existence of a *qualified – not absolute* – privilege to interfere through threatened or actual litigation. *Id.* at 106-107; *see also Id.* at

109 (J. Wallace) ("It must be noted that the claimed privilege is not absolute, *but qualified* . . . ") (emphasis in original). In doing so, the court referred to *"good faith* litigants," meaning those who act with a motive "not regarded as malicious." *Id.* at 107. The court also specified that, to sustain a privilege defense for litigation that interfered with a contract, the defendant must have "asserted a *colorable claim*"; that is, the defendant must have had *"a well grounded and justifiable* belief of a right" to assert such a claim. *Id.*

After discussing the nature of the *qualified* privileged, the Texas Supreme Court expressly held that the privilege applies to both threatened *and actual* litigation: *"This privilege extends to the actual assertion or threatened assertion of rights." Id.* In direct support of this holding the Texas Supreme Court cited an earlier intermediate state court opinion in which the court applied a qualified privilege for both the threat and actual filing of suit, *Morris v. Jordan Financial Corp.*, 564 S.W.2d 180, 184 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e.); and elsewhere in *Sakowitz* the Supreme Court approvingly cited an opinion in which the intermediate court applied a qualified privilege for a lawsuit, *Terry v. Zachry*, 272 S.W.2d 157, 159 (Tex. Civ. App. – San Antonio 1954, writ ref'd n.r.e.). Other courts also have applied a qualified privilege for threatened and actual litigation. *Hahn & Clay v. A. O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963); *Hughes v. Houston Northwest Medical Center*, 680 S.W.2d 838, 842 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 1020 (1985) ("Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference").

The Texas Supreme Court recently issued an opinion that discusses tortious interference and privilege. *Victoria Bank and Trust Company v. Brady*, 811 S.W.2d 931 (Tex. 1991). Although the acts alleged to be privileged in that case did not involve litigation, the Texas Supreme Court reiterated the *Sakowitz* requirement that in order to be privileged the assertion of a claim must be based on "a colorable legal right." *Id.* at 939. Further, the court held that the privilege "only protects good faith assertions of legal rights." The Texas Supreme Court also quoted from a prior intermediate court opinion which held that "legal proceedings" or other interfering acts must be instituted "in good faith" to be privileged. *Id.* at 939-940. The Fifth Circuit relied in part on *Victoria Bank* in rejecting Rally's "absolute privilege" contention. 939 F.2d at 1270.

The Texas Supreme Court and intermediate court opinions discussed above are consistent with other authorities addressing tortiously interfering litigation. *See, e.g.*, 4 Restatement (Second) of Torts, § 767, pp. 30-31 (1979) (comments under "prosecution of civil suit") ("Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries"). Similar privilege principles are followed in numerous other jurisdictions and in Fifth Circuit decisions under the Noerr-Pennington doctrine. *See* Brief of Appellants, pp. 28-31.

Rally's relies heavily upon two Texas intermediate court decisions holding that the filing of a lis pendens notice is absolutely privileged in a suit for tortious interference. *Prappas v. Meyerland Community Improvement*

Assoc., 795 S.W.2d 794 (Tex. App. – Houston [14th Dist.] 1990, no writ); and *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. – Dallas 1985, writ ref'd, n.r.e.). In both cases, however, the courts emphasized that the narrow issue decided was whether the filing of a lis pendens notice *alone* was absolutely privileged. *Prappas*, 795 S.W.2d at 795; *Griffin*, 702 S.W.2d at 693. The courts did not have before them the question of whether the filing of a lawsuit was absolutely privileged, contrary to Rally's representation in its petition, and, again, that question was answered in the negative in *Sakowitz* and other opinions. *See* 939 F.2d at 1269, n. 12. Furthermore, the rationale for providing absolute privilege protection for the filing of a lis pendens notice does *not* apply to the filing of a suit, as the district court observed in this case. (R. 585). The purpose of the privilege for lis pendens is to encourage the giving of record notice of suit to the public in general and in particular to prospective, unknowing purchasers of the property in dispute. A lis pendens notice is unrelated to the merits of a suit or the motive for filing suit.

E. State Law Permeates The Issue Raised By Rally's.

The only statutory or constitutional provision identified by Rally's as being involved in the disposition of the petition is the Texas constitutional "open courts" provision. Petition, p. 2. Rally's also devotes considerable discussion (pp. 10-12) to this provision, which states,

> All courts shall be open, and every person for an injury done him, in his lands, goods, personal reputation, shall have remedy by due course of law.

Tex. Const. art. I, § 13. As is obvious, the express language of the constitution does *not* require application of an absolute privilege, and, again, *Sakowitz* and numerous other cases have adopted only a qualified privilege for tortiously interfering threats of suit and actual suits. Moreover, an absolute privilege would close the courthouse door completely to a plaintiff seeking redress for "an injury done" by the filing of a frivolous, interfering suit. In contrast, a qualified privilege maintains open access to the courthouse for "every person." Lastly, Rally's acknowledged in the court of appeals that Texas law permits a defendant in a meritless suit to "sue for malicious prosecution" (Brief of Appellee, p. 28), yet Rally's fails to explain why it is permissible under the Texas constitution to assert the tort of malicious prosecution but supposedly not permissible to assert the tort of tortious interference.

The predominance of state law issues further supports denial of the writ.

F. The Interlocutory Status Of This Case Militates Against Review.

The Fifth Circuit vacated the district court's order granting summary judgment and remanded this cause for trial on the merits. Any claimed error regarding the ultimate determination of Rally's liability can be challenged later.

II.

There Is Not A "Wide Split" Among The Circuits About Whether A Rule 56(f) Request For A Delay In Consideration Of A Motion For Summary Judgment Must Always Be Supported By An Affidavit, And In Any Event An Affidavit Was Submitted In This Case.

Rally's argues that the Fifth Circuit "ruled" in this case that a Rule 56(f) affidavit is not required and that this ruling evidences a "wide split" among the circuits on this point. Petition, p. 14. For several reasons, however, this argument does not merit certiorari review.

First, the Fifth Circuit's reversal of the summary judgment rendered by the trial court rested on a ground independent of its holding that the district court should have granted Shortstop's Rule 56(f) request. Specifically, the Fifth Circuit held that Rally's motion for summary judgment on the affirmative defense of privilege to interfere, as to which Rally's bore the burden of proof, raised an issue of intent and state of mind which was inappropriate for summary judgment. 939 F.2d at 1264-66.

In addition, Rally's petition is silent about the particular circumstances in which the Rule 56(f) request arose in this case. Discovery was still in progress when Rally's moved for summary judgment, and Shortstop's initial response to the motion invoked Rule 56(f) and pointed out that critical depositions were scheduled *that week*. (R. 1818). Rally's had continually resisted efforts to discover documents, interrogatory answers, and testimony about Rally's purported good faith in filing the Arkansas lawsuit. (R. 1112, 1123-24, 1143-52, 1272-94, 1332-53). Rally's resisted by asserting attorney-client privilege, but made

clear that it waived the attorney-client privilege *to the extent that it would assist Rally's in establishing its affirmative defense*. (R. 1333).

After the filing of Shortstop's initial response to Rally's motion for summary judgment but *before* the district court had ruled on the motion, a magistrate judge to whom the discovery dispute had been referred ruled that Rally's had waived its claim of attorney-client privilege with respect to its affirmative defense and ordered Rally's to produce documents and testimony pertinent to Rally's intent in filing the Arkansas lawsuit. (R. 944). Shortstop then promptly submitted a supplemental response to Rally's motion for summary judgment explaining the circumstances giving rise to a need for additional time under Rule 56(f) and supported that request with an affidavit. (R. 786; Supp. R.). Meanwhile, Rally's appealed the magistrate judge's order to the district court. (R. 695). Later, in a pleading concerning discovery, Rally's made a statement confirming the pertinence of the unproduced documents to the issue of good faith:

> Plaintiffs have attempted to take the depositions of Rally's former and present counsel regarding Rally's 'good faith' in filing its Arkansas lawsuit. . . . Similarly, production of privileged documents would be pointless since those documents only concern Rally's good faith in filing its suit.

(R. 276). Nonetheless, the district court never ruled on Shortstop's Rule 56(f) request or on Rally's appeal from the magistrate judge's order. Under these circumstances, the Fifth Circuit's holding about the Rule 56(f) request was eminently correct. 939 F.2d at 1267-68.

Finally, although a few circuit court opinions have expressed a difference in view about the narrow issue of whether an affidavit is *always* required to sustain a Rule 56(f) request, Rally's assertion that there is a "wide split" overstates the situation. In instances when a court has stated that an affidavit is required, there usually have been other circumstances supporting denial of the Rule 56(f) request, and the circuit court often has discussed the request on the merits. *See, e.g., Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780-81 (3rd Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Radich v. Goode*, 886 F.2d 1391, 1399 (3rd Cir. 1989) (Hutchinson, J., concurring). This issue does not appear to be creating significant problems or controversies around the country, and, in any event, the instant case is not an appropriate vehicle for addressing the issue.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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